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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

**STATE OF CALIFORNIA,  
COMMONWEALTH OF  
MASSACHUSETTS, STATE OF  
MARYLAND, STATE OF COLORADO,  
STATE OF CONNECTICUT, STATE OF  
ILLINOIS, PEOPLE OF THE STATE OF  
MICHIGAN, STATE OF MINNESOTA,  
STATE OF NEVADA, STATE OF NEW  
JERSEY, STATE OF NEW MEXICO,  
STATE OF NEW YORK, STATE OF  
NORTH CAROLINA, STATE OF  
OREGON, COMMONWEALTH OF  
PENNSYLVANIA, STATE OF RHODE  
ISLAND, STATE OF VERMONT, STATE  
OF WASHINGTON, STATE OF  
WISCONSIN, DISTRICT OF COLUMBIA,  
and CITY OF NEW YORK,**

Plaintiffs,

v.

**DAVID BERNHARDT, U.S. Secretary of  
the Interior, WILBUR ROSS, U.S. Secretary  
of Commerce, UNITED STATES FISH  
AND WILDLIFE SERVICE, and  
NATIONAL MARINE FISHERIES  
SERVICE,**

Defendants.

Case No. 4:19-cv-06013-JST

Related Cases: No. 4:19-cv-05206-JST

No. 4:19-cv-06812-JST

**STATE PLAINTIFFS' NOTICE OF  
MOTION AND MOTION FOR  
SUMMARY JUDGMENT;  
MEMORANDUM IN SUPPORT**

Date: July 21, 2021  
Time: 2:00 p.m.  
Place: Courtroom 6, 2nd Floor  
Judge: Hon. Jon S. Tigar

1           **NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**  
2           **TO ALL PARTIES AND COUNSEL OF RECORD:**

3           PLEASE TAKE NOTICE that, on July 21, 2021, at 2:00 p.m., Plaintiffs State of  
4 California, *et al.* (collectively, “State Plaintiffs”), by and through the undersigned counsel, will,  
5 and hereby do, move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil  
6 Procedure and Civil Local Rule 7. This motion will be made before the Honorable Jon S. Tigar,  
7 United States District Judge, Oakland Courthouse, 1301 Clay Street, Oakland, CA 94612.

8           Pursuant to Rule 56 of the Federal Rules of Civil Procedure, State Plaintiffs hereby move  
9 for summary judgment on the ground that there is no genuine dispute as to any material fact and  
10 the movant is entitled to judgment as a matter of law. This motion is based on the accompanying  
11 Memorandum of Points and Authorities, the Declarations of Chad Dibble, Everose N. Schluter,  
12 Tucker Jones, and Drew Feldkirchner, and the administrative record.

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## INTRODUCTION

1  
2 State Plaintiffs challenge the Trump Administration’s decision to promulgate three final  
3 rules (“Final Rules”) that undermine key requirements of the federal Endangered Species Act  
4 (“ESA” or “Act”), 16 U.S.C. §§ 1531 *et seq.* As the Supreme Court has recognized, the ESA was  
5 designed to afford species the “highest of priorities” and “to halt and reverse the trend toward  
6 species extinction, whatever the cost.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174, 184 (1978)  
7 (“*Hill*”). But the Final Rules—pushed by the Administration to further its political, deregulatory  
8 agenda at the expense of protected species—violate the ESA’s plain language, structure, and  
9 conservation purposes by, among other infirmities, unlawfully injecting cost considerations into  
10 listing decisions, removing species recovery as a requirement for delisting, restricting designation  
11 of critical habitat for species survival and recovery, undermining the number, type, and scope of  
12 interagency consultations on federal agency actions, and removing critical protections for  
13 threatened species. In addition, Defendants Secretary of the Interior and Secretary of Commerce,  
14 acting through the U.S. Fish & Wildlife Service (“FWS”) and the National Marine Fisheries  
15 Service (“NMFS”) (collectively, “the Services”), have failed to provide any reasoned basis for  
16 these rules or an opportunity to comment on new aspects of the Final Rules, in violation of the  
17 Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551 *et seq.* Finally, the Services violated the  
18 National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 *et seq.*, by categorically  
19 excluding the Final Rules from environmental review, despite their significant impacts on  
20 imperiled species and critical habitat. Consequently, the Court should grant State Plaintiffs’  
21 motion for summary judgment and vacate the Final Rules.

## STATUTORY BACKGROUND

22  
23 Signed into law by President Richard Nixon, the ESA constitutes “the most comprehensive  
24 legislation for the preservation of endangered species ever enacted by any nation.” *Hill*, 437 U.S.  
25 at 180. The fundamental purposes of the ESA are to “provide a means whereby the ecosystems  
26 upon which endangered ... and threatened species depend may be conserved” and “to provide a  
27 program for” the conservation of such species. 16 U.S.C. § 1531(b). The ESA enshrines a  
28 national policy of “institutionalized caution,” in recognition of the “overriding need to devote

1 whatever effort and resources [are] necessary to avoid further diminution of national and  
 2 worldwide wildlife resources.” *Hill*, 437 U.S. at 177, 194 (internal quotation omitted).  
 3 Accordingly, the ESA declares “the policy of Congress that all Federal departments and agencies  
 4 shall seek to conserve endangered ... and threatened species and shall utilize their authorities in  
 5 furtherance of the purposes of [the ESA].” 16 U.S.C. § 1531(c)(1) (emphasis added). The Act  
 6 defines “conserve” broadly as “to use and the use of all methods and procedures which are  
 7 necessary to bring any endangered ... or threatened species to the point at which the measures  
 8 provided pursuant to this chapter are no longer necessary,” *i.e.*, to the point of full recovery. *Id.*  
 9 § 1532(3); see *Gifford Pinchot Task Force v. FWS*, 378 F.3d 1059, 1070 (9th Cir. 2004) (“[T]he  
 10 ESA was enacted not merely to forestall extinction of species ... but to allow a species to recover  
 11 to the point where it may be delisted.”).

12 The ESA achieves its overriding conservation purpose through multiple vital programs, all  
 13 of which are undermined by the Final Rules. Section 4 prescribes the process for the Services to  
 14 list a species as “endangered” or “threatened” based solely on the best scientific and commercial  
 15 data. 16 U.S.C. §§ 1533(a)(1)-(2), (b)(1).<sup>1</sup> Section 4 also directs the Services to designate, “to  
 16 the maximum extent prudent and determinable,” specified “critical habitat” for each species  
 17 concurrent with its listing, including areas both currently occupied and unoccupied by those  
 18 species. *Id.* § 1533(a)(3). Specifically, the ESA defines critical habitat as:

19 (i) the specific areas *within* the geographical area occupied by the species, at the time it  
 20 is listed in accordance with the [ESA], on which are found those physical or biological  
 21 features (I) essential to the conservation of the species and (II) which may require  
 22 special management considerations or protection; *and* (ii) specific areas *outside* the  
 23 geographical area occupied by the species at the time it is listed ... upon a determination  
 24 by the Secretary that such areas are essential for the conservation of the species.

25 *Id.* § 1532(5)(A) (emphases added).

26 Section 7, in turn, requires all federal agencies to “insure” that any action they propose to  
 27 authorize, fund, or carry out “is not likely to jeopardize the continued existence of any  
 28 endangered ... or threatened species or result in the destruction or adverse modification of” any

<sup>1</sup> The ESA defines an “endangered species” as “any species which is in danger of extinction throughout all or a significant portion of its range,” and a “threatened species” is “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* §§ 1532(6), (20).

1 designated critical habitat. 16 U.S.C. § 1536(a)(2). If a proposed federal agency action may  
2 affect any listed species or critical habitat, the federal action agency must initiate consultation  
3 with the relevant Service. *Id.* §§ 1536(b)(3), (c)(1). The Service must then prepare a biological  
4 opinion to determine whether the action is likely to jeopardize any listed species or destroy or  
5 adversely modify any designated critical habitat and, if so, to provide “reasonable and prudent  
6 alternatives” to the agency action that would avoid jeopardy or adverse modification, as well as  
7 “reasonable and prudent measures ... necessary or appropriate to minimize such impact,” and  
8 specified “terms and conditions” for implementing those measures. *Id.* §§ 1536(b)(3)(A), (b)(4).

9 Finally, section 9 prohibits any person from “taking” (e.g., killing, injuring, harassing or  
10 harming) any listed endangered fish or wildlife species and prohibits certain other actions with  
11 respect to listed endangered plant species. 16 U.S.C. §§ 1532(19), 1538(a)(1)(B), (G). Section  
12 4(d) authorizes the Services to extend by regulation any or all of these section 9 prohibitions to  
13 threatened species, *id.* § 1533(d), which FWS has done since the 1970s, *see* 40 Fed. Reg. 44,412,  
14 44,414 (Sept. 26, 1975) (fish and wildlife species); 42 Fed. Reg. 32,374 (June 24, 1977) (plants).

### 15 **FACTUAL AND PROCEDURAL BACKGROUND**

16 The Services share joint responsibility for implementing the ESA to protect and conserve  
17 imperiled species and their habitats. *See* 16 U.S.C. § 1532(16).<sup>2</sup> Currently, the ESA protects  
18 over 1,600 plant and animal species in the United States and its territories, and millions of acres  
19 of land have been designated as critical habitat to allow for species conservation, including  
20 recovery. *See* ECF No. 105, ¶ 105. The Services adopted joint regulations implementing sections  
21 4 and 7 in the 1980s. *See, e.g.*, 45 Fed. Reg. 13,010 (Feb. 27, 1980) (section 4); 49 Fed. Reg.  
22 38,900 (Oct. 1, 1984) (section 4); 51 Fed. Reg. 19,926 (June 3, 1986) (section 7). Since then, the  
23 Services have not substantially amended these regulations,<sup>3</sup> and ninety-nine percent of listed  
24 species have escaped extinction. *See* ECF No. 105, ¶ 105.

25 In early 2017, however, the Trump Administration abruptly reversed course. On January  
26

27 <sup>2</sup> In general, FWS is responsible for terrestrial and inland aquatic fish, wildlife, and plant species,  
while NMFS is responsible for marine and anadromous species.

28 <sup>3</sup> The Services adopted minor revisions in 2015 and 2016. *See* 80 Fed. Reg. 26,832 (May 11,  
2015); 81 Fed. Reg. 7,214 (Feb. 11, 2016); 81 Fed. Reg. 7,414 (Feb. 11, 2016).

1 30, 2017, President Trump issued Executive Order 13,771 entitled, “Reducing Regulation and  
 2 Controlling Regulatory Costs,” directing that “for every one new regulation issued, at least two  
 3 prior regulations be identified for elimination,” and that any costs associated with new regulations  
 4 shall be offset by eliminating costs associated with at least two prior regulations. 82 Fed. Reg.  
 5 9,339 (Feb. 3, 2017). Defendants made a concerted effort from “day one” to implement this  
 6 deregulatory agenda. *See* ESA2\_127465; ESA2\_127490 (defining “deregulatory” as an action  
 7 “expected to have total costs less than zero”).<sup>4</sup> The record reflects that high-level political  
 8 appointees within the Department of the Interior and the White House—in particular, Defendant  
 9 Secretary David Bernhardt, then Deputy Secretary of the Interior (*see, e.g.*, ESA2\_3466;  
 10 ESA2\_7456; ESA2\_15305; ESA2\_17620);<sup>5</sup> Todd Willens, Assistant Deputy Secretary and later  
 11 Secretary Bernhardt’s Chief of Staff (*see, e.g.*, ESA2\_2008, ESA2\_35621); and Stuart  
 12 Levenbach, a senior policy analyst at the White House Office of Information and Regulatory  
 13 Affairs (“OIRA”)<sup>6</sup> (*see, e.g.*, ESA2\_2211-12; ESA2\_21974)—rushed through proposals to  
 14 weaken the Services’ listing, critical habitat designation, and consultation provisions without  
 15 meaningful participation by career staff (*see, e.g.*, ESA2\_10208 (“working under a very  
 16 compressed time frame from DOI leadership”)). In fact, NMFS did not even learn of Secretary  
 17 Bernhardt’s planned changes to the rules until OIRA sought to add them to its public agenda.  
 18 *See, e.g.*, ESA2\_1543; ESA2\_2035-37; ESA2\_2132; ESA2\_4864. Meanwhile, the Services’  
 19 career staff expressed repeated frustration regarding their inability to affect the rulemaking  
 20 process. *See, e.g.*, ESA2\_3417; ESA2\_5189; ESA2\_54918.

21 Under the direction of Secretary Bernhardt and other high-level political appointees, on  
 22 July 25, 2018, the Services published three rules proposing to revise numerous key requirements  
 23 of the ESA’s implementing regulations, ESA 206, 222, 227 (collectively, the “Proposed Rules”),  
 24 including many changes adopted at the request of industry groups in connection with the Trump

25 \_\_\_\_\_  
 26 <sup>4</sup> The administrative record is cited as “ESA [page number]” or “ESA2\_[page number],” excluding leading zeros.

27 <sup>5</sup> Several months after initiating the rulemaking, Secretary Bernhardt belatedly sought an ethics  
 clearance “to participate in the rulemaking process” for the Final Rules. ESA2\_52202.

28 <sup>6</sup> In January 2018, Mr. Levenbach was appointed Chief of Staff at the National Oceanic and  
 Atmospheric Administration, which oversees NMFS. *See* ESA2\_20888-89.

1 Administration’s Regulatory Reform Task Force. *See, e.g.*, ESA 2204-10, 2214-27, 2230-32,  
2 2369-73, 2425, 2572-73, 2656-58, 2668, 2713-15, 2847-54, 2869-71. The Services explicitly  
3 characterized all three rules as “deregulatory action[s]” pursuant to Executive Order 13,771. ESA  
4 218, 224, 233; *see* ESA2\_127465; ESA2\_17358; ESA2\_31865; ESA2\_31883; ESA2\_50391.

5 State Plaintiffs submitted comments on the Proposed Rules on September 24, 2018, urging  
6 the Services to withdraw the rules on the grounds that they would, if finalized, be unlawful and  
7 contrary to the ESA, APA, and NEPA. ESA 91280. Despite overwhelming opposition to the  
8 Proposed Rules—including from the State Plaintiffs, Plaintiffs in these related cases, and a  
9 diverse array of other interest groups—the Services issued the Final Rules on August 27, 2019.  
10 84 Fed. Reg. 44,753 (the “4(d) Rule”) (ESA 11); 84 Fed. Reg. 44,976 (the “Interagency  
11 Consultation Rule”) (ESA 19); 84 Fed. Reg. 45,020 (the “Listing Rule”) (ESA 62). The Final  
12 Rules enacted many damaging, illegal changes to key ESA programs.

13 The Listing Rule: (i) eliminated the requirement that listing decisions be made “without  
14 reference to possible economic or other impacts”; (ii) added a requirement that, to list a species as  
15 “threatened,” the threats and species’ responses thereto must be more likely than not to occur in  
16 the “foreseeable future,” based on “environmental variability” and other factors; (iii) eliminated  
17 species recovery as a basis for delisting; (iv) significantly expanded the circumstances in which  
18 the Services may find that it is “not prudent” to designate critical habitat for listed species; and (v)  
19 restricted the designation of currently unoccupied critical habitat by requiring the Services to first  
20 determine that currently occupied areas are inadequate for species conservation, and then to find  
21 with “reasonable certainty” that an area will contribute to the conservation of the species and  
22 currently contains one or more features “essential to the conservation of the species.”

23 The Interagency Consultation Rule: (i) redefined the definition of “destruction or adverse  
24 modification” of critical habitat triggering section 7 consultation, to require the critical habitat to  
25 be appreciably diminished in conservation value “as a whole”; (ii) eliminated from the definition  
26 of “destruction or adverse modification” any actions that alter “physical or biological features  
27 essential to the conservation of a species”; (iii) changed the definition of “effects of the action” by  
28 limiting both the type and extent of effects of a proposed federal agency action requiring analysis

1 in the section 7 consultation process; (iv) defined “environmental baseline” to include “ongoing  
2 agency activities or existing agency facilities that are not within the agency’s discretion to  
3 modify,” thereby exempting such ongoing actions from analysis as effects of a proposed agency  
4 action under section 7; (v) weakened the requirement for action agencies to ensure that mitigation  
5 measures for the adverse effects of their actions are actually implemented and enforceable; (vi)  
6 created a new consultation procedure allowing the Services to adopt a non-expert federal action  
7 agency’s biological analyses as their own biological opinions; (vii) authorized “expedited”  
8 consultations in 50 C.F.R. § 402.14(l); and (viii) added an exemption from the requirement to  
9 reinitiate consultation on implementation of ongoing U.S. Bureau of Land Management (“BLM”)  
10 land management plans when a new species is listed or new critical habitat is designated.

11 Finally, the 4(d) Rule removed the longstanding “blanket” regulatory extension of all  
12 section 9 protections applicable to endangered species to all threatened species, putting newly-  
13 listed threatened species at risk of extinction pending promulgation of species-specific rules.

14 Despite the Final Rules’ substantive breadth and significant environmental impacts, the  
15 Services determined that they are categorically excluded from NEPA review because they are of a  
16 legal, technical, or procedural nature. ESA 17, 58, 93.

### 17 **STANDING**

18 Pursuant to the Court’s Order Denying Motion to Dismiss (ECF No. 98) and the  
19 Declarations of Chad Dibble, Everose N. Schluter, Tucker Jones, and Drew Feldkirchner,  
20 submitted herewith, State Plaintiffs have standing to bring this action because the Final Rules  
21 significantly weaken protections for listed species and their habitat—resources within, held in  
22 trust, and regulated by State Plaintiffs—and vacatur will remedy those harms.

### 23 **STANDARD OF REVIEW**

24 Summary judgment should be granted when the record demonstrates that “there is no  
25 genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”  
26 Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In deciding whether to  
27 grant summary judgment in an APA review of an administrative proceeding, the district court “is  
28 not required to resolve any facts.” *Occidental Eng’g Co. v. INS*, 753 F.2d 766, 769 (9th Cir.

1 1985). Rather, the court “is to determine whether or not as a matter of law the evidence in the  
2 administrative record permitted the agency to make the decision it did.” *Id.*; see *California v.*  
3 *Bernhardt*, 472 F. Supp. 3d 573, 590-91 (N.D. Cal. 2020). “The APA sets forth the procedures  
4 by which federal agencies are accountable to the public and their actions subject to review by the  
5 courts.” *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020)  
6 (internal quotations and citation omitted). A “reviewing court shall ... hold unlawful and set  
7 aside” agency action found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in  
8 accordance with law,” “in excess of statutory jurisdiction, authority or limitations,” or “without  
9 observance of procedure required by law.” 5 U.S.C. § 706(2)(A), (C), (D).

10 The promulgation of a final regulation is invalid as “not in accordance with law” and in  
11 excess of its statutory jurisdiction and authority if the regulation is “manifestly contrary to the  
12 statute.” *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 844 (1984) (“*Chevron*”). In making that  
13 determination, the Court first determines “whether Congress has directly spoken to the precise  
14 question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as  
15 well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Id.* at  
16 842-43. In this analysis, the court examines “the legislative history, the statutory structure, and  
17 other traditional aids of statutory interpretation in order to ascertain congressional intent.” *Altera*  
18 *Corp. & Subsid. v. Comm’r of Internal Revenue*, 926 F.3d 1061, 1075 (9th Cir. 2019) (internal  
19 quotations omitted). If, however, “the statute is silent or ambiguous with respect to the specific  
20 issue, the question for the court is whether the agency’s answer is based on a permissible  
21 construction of the statute.” *Chevron*, 467 U.S. at 843.

22 An agency action is invalid as arbitrary and capricious under the APA where the agency:  
23 “has relied on factors which Congress has not intended it to consider, entirely failed to consider  
24 an important aspect of the problem, offered an explanation for its decision that runs counter to the  
25 evidence before the agency, or is so implausible that it could not be ascribed to a difference in  
26 view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm*  
27 *Mut. Auto. Ins. Co.* (“*State Farm*”), 463 U.S. 29, 43 (1983). An “agency changing its course ... is  
28 obligated to supply a reasoned analysis for the change.” *Id.* at 42; see also *Encino Motorcars*,

1 *LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). Thus, “even when reversing a policy after an  
2 election, an agency may not simply discard prior factual findings without a reasoned  
3 explanation.” *Organized Vill. of Kake v. USDA*, 795 F.3d 956, 968 (9th Cir. 2015); see *Dep’t of*  
4 *Com. v. New York*, 139 S. Ct. 2551, 2575-76 (2019). Further, when an agency’s “new policy rests  
5 upon factual findings that contradict those which underlay its prior policy,” an agency must  
6 “provide a more detailed justification than what would suffice for a new policy created on a blank  
7 slate.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). An “unexplained  
8 inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and  
9 capricious change.” *Encino*, 136 S. Ct. at 2126 (internal quotations omitted).

## 10 ARGUMENT

### 11 I. THE FINAL RULES ARE CONTRARY TO THE ESA.

12 Each of the Final Rules violates both the letter and purpose of ESA and collectively, they  
13 wreak havoc on the national policy of “institutionalized caution” enshrined in the Act. See *Hill*,  
14 437 U.S. at 177-78. Rather than “to halt and reverse the trend toward species extinction,  
15 *whatever the cost[,]*” *id.* at 184 (emphasis added), the Final Rules expressly promote a  
16 deregulatory agenda at the expense of protected species and their habitat, contrary to the Act’s  
17 specific requirements and overarching conservation mandate. See 16 U.S.C. §§ 1531(b), (c)(1),  
18 1536(a)(1). The Listing Rule guts both the species listing and critical habitat designation  
19 provisions of section 4—the “cornerstone of effective implementation of the [ESA].” S. REP. NO.  
20 97-418, at 10 (1982). The Consultation Rule undermines the “explicit congressional decision”  
21 reflected in Section 7—the “heart of the ESA”—“to require agencies to afford *first priority* to the  
22 declared national policy of saving endangered species.” *Hill*, 437 U.S. at 185 (emphasis added);  
23 *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011). And the 4(d) Rule  
24 eliminates default protections “necessary to provide for the conservation” of threatened species  
25 protected by the Act. 16 U.S.C. §§ 1531(b), (c)(1), 1533(d). As detailed below, the Final Rules  
26 are contrary to the plain language of the ESA and cannot stand. But even if the Court finds  
27 ambiguity in a particular provision of the ESA, the Final Rules violate any permissible  
28 construction of the statute.

1           **A. The Listing Rule Limits Species Listings and Critical Habitat Designations in**  
 2           **Violation of the ESA.**

3           **“Presentation of Economic or Other Information” (50 C.F.R. § 424.11(b))**

4           The Final Rules violate the text and purpose of Section 4 by eliminating regulatory  
 5 language in former section 424.11(b) requiring that listing decisions be made “without reference  
 6 to possible economic or other impacts of such determination[s].” ESA 66, 94. As the Services  
 7 admit, the ESA “does not expressly authorize compiling economic information,” ESA 67; indeed,  
 8 the Act expressly prohibits it. The Act clearly states that listing decisions “*shall*” be made “*solely*  
 9 on the basis of the best scientific and commercial data available” regarding the status of the  
 10 species, such as habitat destruction, disease, and predation.<sup>7</sup> 16 U.S.C. § 1533(b)(1)(A)  
 11 (emphases added). While the ESA expressly authorizes consideration of economic impacts in  
 12 designating critical habitat, 16 U.S.C. § 1533(b)(2), it requires listing decisions to center  
 13 exclusively on biological threats to species, *id.* § 1533(a)(1), (b)(1)(A). *See Russello v. United*  
 14 *States*, 464 U.S. 16, 23 (1983) (“Where Congress includes particular language in one section of a  
 15 statute but omits it in another section of the same Act, it is generally presumed that Congress acts  
 16 intentionally and purposely in the disparate inclusion or exclusion.”) (internal quotations and  
 17 citation omitted).

18           The Act’s legislative history confirms what its text makes clear: Congress added the term  
 19 “solely” to section 4’s listing provisions to emphasize that listing determinations were to be made  
 20 “solely upon biological criteria[,] ... to prevent non-biological considerations from affecting such  
 21 decisions,” H.R. REP. No. 97-567, at 12, 19 (1982);<sup>8</sup> to “improve[] and expedite[]” the listing  
 22 process; and to divert “the balancing between science and economics” to “the [critical habitat]  
 23 exemption process,” *id.* at 12.<sup>9</sup> The Services cannot save their unlawful action with the empty  
 24 promise that they will only spend time and resources “compiling,” but not “considering,”

25 <sup>7</sup> The term “commercial data” refers to data about species trading and does “not ... authorize the  
 26 use of economic considerations in the process of listing a species.” H.R. REP. No. 97-567, at 20  
 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2820.

27 <sup>8</sup> *See also* H.R. CONF. REP. No. 97-835, at 20 (1982) (“[E]conomic considerations have no  
 28 relevance to” listing determinations); S. REP. No. 97-418, at 4, 11 (1982).

<sup>9</sup> *See also* S. REP. No. 97-418, at 4 (1982) (1982 amendments “would ensure that ... economic  
 analysis ... will not delay or affect decisions on listing”); *id.* at 11.

1 economic impact data. ESA 66. Whether enabling the Services to consider—or even just to  
2 gather—such information in the listing process, the Listing Rule violates section 4(b)(1)(A).

3 **“Foreseeable Future” (50 C.F.R. § 424.11(d))**

4 The Listing Rule unlawfully limits the circumstances under which the Services may list  
5 species as threatened by defining the phrase “foreseeable future” in the statutory definition of  
6 “threatened species” (16 U.S.C. § 1532(20)) to mean that “both future threats to a species and  
7 species’ responses to those threats are likely” (*e.g.*, “more likely than not,” ESA 63), taking into  
8 account species’ “life-history characteristics, threat-projection timeframes, and environmental  
9 variability.” ESA 94. But, again, the Act requires that “the best scientific and commercial data  
10 available” drive listing decisions and that such decisions be designed to achieve the Act’s  
11 overriding goal of recovering such species and giving the benefit of the doubt to the species. 16  
12 U.S.C. §§ 1531(b), (c)(1), 1533(b)(1)(A), 1536(a)(1); *Hill*, 437 U.S. at 194 (describing the ESA’s  
13 overarching policy of “institutionalized caution”). The Act thus does not allow the application of  
14 an arbitrary, “more likely than not” (greater than 51%), quantitative standard regarding whether a  
15 species will become endangered in the “foreseeable future.” Nor does the ESA authorize the  
16 Services to discount evidence of significant future threats to species—such as those posed by  
17 climate change—and species’ anticipated responses to those threats. *See* 16 U.S.C. §§ 1532(20),  
18 1533(b)(1)(A). The Listing Rule’s new, *ultra vires* requirements unlawfully permit the Services  
19 to disregard evidence of severe threats that may be less than 50% likely but that would, if  
20 realized, be 100% catastrophic to a species, in violation of section 4(b)(1)(A) as well as the Act’s  
21 conservation purposes. *Id.* §§ 1531(b), (c)(1), 1536(a)(1).

22 **“Recovery in Delisting” (50 C.F.R. § 424.11(e))**

23 The Listing Rule also unlawfully removes species recovery as a factor to be considered in  
24 whether a species should be delisted. ESA 63, 94-95. As the Ninth Circuit aptly recognized, “the  
25 ESA was enacted ... to allow a species *to recover* to the point where it may be delisted.” *Gifford*  
26 *Pinchot Task Force*, 378 F.3d at 1070 (emphasis added); *accord Alaska v. Lubchenco*, 723 F.3d  
27 1043, 1054 (9th Cir. 2013). The Act is designed to bring endangered and threatened species “to  
28 the point at which the measures provided pursuant to this [Act] are no longer necessary,” *i.e.*, to

1 the point of full recovery. 16 U.S.C. § 1532(3). And the ESA mandates that the Services  
 2 implement recovery plans “for the conservation and survival” of listed species which must  
 3 include “criteria which, *when met, would result in a determination* in accordance with the  
 4 provisions of this section, *that the species be removed from the list.*” *Id.* § 1533(f)(1)(B)(ii)  
 5 (emphases added). In other words, the Act makes recovery a prerequisite to any delisting  
 6 determination—a fact Congress confirmed when it added the recovery plan requirement in 1988.  
 7 *See, e.g.,* S. REP. No. 100-240, at 9 (1987), *reprinted in* 1988 U.S.C.C.A.N. 2700, 2709 (recovery  
 8 plans to “contain *objective, measurable criteria for removal of a species from the Act’s lists*”)  
 9 (emphasis added). The Listing Rule’s removal of species recovery from the delisting analysis  
 10 thus violates sections 3(3) and 4(f).

11 The Services’ reliance on the D.C. Circuit’s decision in *Friends of Blackwater v. Salazar*,  
 12 691 F.3d 428 (D.C. Cir. 2012)—which is not binding on this Court—is unavailing. *See* ESA 76-  
 13 77, 230. Notably, in that case, FWS *did* in fact rely on the recovery of the West Virginia northern  
 14 flying squirrel as a basis for its delisting decision. *See Friends of Blackwater*, 691 F.3d at 431; 73  
 15 Fed. Reg. 50,226 (Aug. 26, 2008) (delisting “due to recovery”); 71 Fed. Reg. 75,924 (Dec. 19,  
 16 2006) (same). And, indeed, the court acknowledged that the Act’s recovery plan requirement  
 17 “can be read ... to place a binding constraint upon the Secretary’s delisting analysis” and  
 18 confirmed that the Act’s delisting “destination” turns on “recovery of the species.” *Friends of*  
 19 *Blackwater*, 691 F.3d at 433; *see id.* at 441-42 (Rogers, J., dissenting) (ESA is “exquisitely clear”  
 20 that recovery plans must be fulfilled prior to delisting). The decision thus does not, and—in light  
 21 of the Act’s plain text—could not, support removing recovery as a basis for delisting.

#### 22 **“Not Prudent Determinations” (50 C.F.R. § 424.12(a))**

23 The Listing Rule unlawfully expands the limited statutorily authorized circumstances  
 24 allowing the Services to find that it is “not prudent” to designate critical habitat for listed species.  
 25 ESA 63, 95. The Act states that the Services, when listing a species, “shall” designate “*to the*  
 26 *maximum extent* prudent and determinable” the habitat that “is then considered to be critical,” 16  
 27 U.S.C. § 1533(a)(3)(A) (emphasis added), *i.e.*, “essential to the conservation of the species,” *id.* §  
 28 1532(5)(A). Recognizing that “the greatest [threat to species] [is] destruction of natural habitats,”

1 *Hill*, 437 U.S. at 179, Congress intended that superlative command to require designation of  
2 critical habitat except in the “rare circumstances” when it “would not be beneficial to the  
3 species.” H.R. REP. No. 95–1625, at 17 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9467; *see*  
4 *also NRDC v. U.S. Dep’t of Interior*, 113 F.3d 1121, 1126 (9th Cir. 1997) (“*NRDC v. DOI*”)  
5 (“The fact that Congress intended the imprudence exception to be a narrow one is clear”) (citing  
6 cases).<sup>10</sup> The Services’ prior regulations hewed to the narrow scope of the Act’s “not prudent”  
7 exception, identifying only two appropriately narrow qualifying circumstances where the  
8 exemption would apply. 50 C.F.R. § 424.12(a)(1) (2017) (where designation would risk harm to  
9 species or would not benefit species).

10 The Listing Rule, however, turns the narrow statutory “not prudent” exception into the new  
11 norm with an amorphous, unlawful list of circumstances under which critical habitat designation  
12 can be deemed “not prudent.” For example, the new exception in section 424.12(a)(1)(ii)—where  
13 “threats to the species’ habitat stem solely from causes that cannot be addressed through  
14 management actions resulting from [section 7] consultation”—conflates the ESA’s distinct  
15 requirements for critical habitat designation and interagency consultation, 16 U.S.C.  
16 §§ 1532(5)(A), 1533(a)(3)(A), 1536(a)(1), and unlawfully authorizes the Services to evade their  
17 designation duty based solely on the projected efficacy of later consultations—an authority  
18 contemplated nowhere in the Act. Similarly, the new exception in section 424.12(a)(1)(iii) allows  
19 the Services to evade the statute’s plain command by claiming critical habitat designation affords  
20 only “negligible conservation value” to the species—*i.e.*, that it is not “beneficial enough”—  
21 turning on its head Congress’s clear intent that designation occur except in “rare circumstances”  
22 when designation “would *not be* beneficial to the species.” H.R. REP. No. 95-1625, at 17 (1978),  
23 *reprinted in* 1978 U.S.C.C.A.N. 9453, 9467 (emphasis added); *cf. NRDC v. DOI*, 113 F.3d at  
24 1126 (“By expanding the imprudence exception to encompass all cases in which designation  
25 would fail to control ‘the *majority* of land-use activities occurring within critical habitat,’ ... the  
26 Service contravenes the clear congressional intent that the imprudence exception be a rare

27 \_\_\_\_\_  
28 <sup>10</sup> *See also* H.R. CONF. REP. NO. 97-835, at 24 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2860, 2865  
 (“limited” exemption applies only where “designation would identify the location of the species”).

1 exception”). And, perhaps most problematic, the new exception in section 424.12(a)(1)(v) gives  
2 the Services vague and unfettered discretion to avoid critical habitat designation if “the Secretary  
3 otherwise determines that designation of critical habitat would not be prudent.” The Services’  
4 vast expansion of the Act’s intentionally narrow “not prudent” exception plainly violates section  
5 4(a)(3)(A) and Congressional intent.

6 **“Unoccupied Critical Habitat” (50 C.F.R. § 424.12(b)(2))**

7 The Listing Rule unlawfully provides that the Services may only designate unoccupied  
8 habitat after determining that occupied areas “would be inadequate to ensure the conservation of  
9 the species.” ESA 63, 95. Section 3 of the ESA, however, expressly defines critical habitat to  
10 include both “specific areas *within* the geographical area occupied by the species” at the time of  
11 listing “*and* specific areas *outside* the geographical area occupied by the species.” 16 U.S.C.  
12 § 1532(5)(A)(i)-(ii) (emphases added); *see Crooks v. Harrelson*, 282 U.S. 55, 58, (1930) (used in  
13 its “ordinary sense,” conjunctive term “and” requires “not one or the other, but both”); 1A  
14 Sutherland Statutory Construction § 21:14 (7th ed. 2013) (“Statutory phrases separated by the  
15 word ‘and’ are usually interpreted in the conjunctive.”). As the Services themselves have  
16 explained, there is “no specific language in the Act that requires the Services to first prove that  
17 the inclusion of all occupied areas in a designation are insufficient to conserve the species before  
18 considering unoccupied areas,” nor any “suggestion in the legislative history that the Services  
19 were expected to exhaust occupied habitat before considering whether any unoccupied areas may  
20 be essential.” 81 Fed. Reg. at 7,426-27. This new limitation on the designation of unoccupied  
21 habitat allows the Services to contravene the Act’s core conservation purpose by forgoing  
22 designation of habitat that species need to recover to prior population levels and ranges, or to  
23 accommodate species migration spurred by, for example, climate change or other natural or  
24 human-caused changes. *See infra* Part I.B.

25 The Listing Rule also unlawfully requires that, in order to designate unoccupied critical  
26 habitat, the Services must first determine that that there is a “reasonable certainty both that the  
27 area will contribute to the conservation of the species *and* that the area contains one or more of  
28 those physical or biological features essential to the conservation of the species.” ESA 95

1 (emphasis added). But even the Services recognize that “the reference to ‘physical or biological  
 2 features’ in the definition of ‘critical habitat’ only occurs in the [subsection] addressing occupied  
 3 habitat.” ESA 64; *see* 16 U.S.C. § 1532(5)(A)(i). The subsection defining unoccupied critical  
 4 habitat merely requires a determination that “such areas are essential for the conservation of the  
 5 species.” *See* 16 U.S.C. § 1532(5)(A)(ii). “Had Congress intended to restrict” that subsection, “it  
 6 presumably would have done so expressly as it did in the immediately [preceding] subsection.”  
 7 *Russello*, 464 U.S. at 23. And, indeed, Congress’s deliberate omission in its unoccupied critical  
 8 habitat provision makes sense, as areas currently unoccupied by a species need not currently  
 9 contain features essential to species conservation; what matters is the area’s capacity to contribute  
 10 to conservation when ultimately occupied. The Listing Rule’s addition of those deliberately  
 11 omitted restrictions is therefore *ultra vires* and unlawful.

12 **B. The Consultation Rule Undermines Federal Agencies’ Section 7 Duties and the**  
 13 **Conservation Purposes of the ESA.**

14 **“Destruction or Adverse Modification” of Critical Habitat (50 C.F.R. § 402.02)**

15 The Consultation Rule unlawfully revises the definition of “destruction or adverse  
 16 modification” of critical habitat in section 7(a)(2)—the statutory trigger for consultation and its  
 17 associated species and critical habitat protections—to add the requirement that the federal agency  
 18 action must appreciably diminish the value of the critical habitat “as a whole.” ESA 59. Under  
 19 this new standard, an action’s adverse effects now trigger consultation only if they “diminish the  
 20 conservation value of the critical habitat in such a *considerable* way that the *overall value of the*  
 21 *entire critical habitat designation to the conservation of the species is appreciably diminished.*”  
 22 ESA 29 (emphases added); *see also* ESA 24 (adverse modification analysis to be performed “at  
 23 the scale of the entire critical habitat designation”). Thus, now, “[i]t is only when adverse effects  
 24 from a proposed action rise to this *considerable level* that the ultimate conclusion of ‘destruction  
 25 or adverse modification’ of critical habitat can be reached.” ESA 29 (emphasis added).

26 The Services’ new “as a whole” approach to assessing impacts on critical habitat directly  
 27 undercuts federal agencies’ and the Services’ section 7 duties to “insure” no destruction or  
 28 adverse modification of critical habitat and to “utilize their authorities” to conserve listed species.

1 16 U.S.C. §§ 1531(b), (c)(1), 1532(5)(A), 1536(a)(1), (a)(2). This language undermines the very  
 2 purpose of critical habitat by sanctioning destruction of portions or features of designated critical  
 3 habitat, which may not necessarily affect the *entirety* of the critical habitat designation, but which  
 4 are nonetheless “essential for” listed species’ conservation. *Id.* § 1532(5)(A); *see Ctr. for Native*  
 5 *Ecosystems v. Cables*, 509 F.3d 1310, 1321-22 (10th Cir. 2007) (“critical habitat is impaired  
 6 when features essential to its conservation are impaired” and “[i]t follows that critical habitat is  
 7 adversely modified by actions that adversely affect species’ recovery”).

8 The “as a whole” language further allows a federal action agency and the Services to ignore  
 9 site-specific, localized, and cumulative impacts on critical habitat, directly contrary to the Ninth  
 10 Circuit’s repeated admonitions that federal agencies’ consideration of such impacts is critical to  
 11 ensure that their section 7 duties are met. *See Pac. Coast Fed’n of Fishermen’s Ass’n v. NMFS*,  
 12 265 F.3d 1028, 1036-37 (9th Cir. 2001) (“*Pacific Coast I*”) (NMFS was required to consider  
 13 aggregate effect of multiple logging projects in making Section 7 determination); *Gifford Pinchot*,  
 14 378 F.3d at 1075 (“Focusing solely on a vast scale can mask multiple site-specific impacts that,  
 15 when aggregated, do pose a significant risk to a species.”); *Nat’l Wildlife Fed’n v. NMFS*, 524  
 16 F.3d 917, 930-31, 934-35 (9th Cir. 2008) (“*NWF v. NMFS*”) (NMFS violated ESA by failing to  
 17 consider short-term effects of dam operations on listed salmon species). Thus, the Services’  
 18 amended definition of “destruction or adverse modification” is contrary to section 7, the  
 19 definition of critical habitat, and the conservation purposes of the Act.

20 **“Effects of the Action” (50 C.F.R. §§ 402.02, 402.17)**

21 The Consultation Rule unlawfully restricts the definition of “effects of the action,” which  
 22 determines the type and extent of effects that must be evaluated by both the federal action agency  
 23 and the Services during the section 7 consultation process. The new definition requires that such  
 24 effects satisfy a new two-prong test that they: (1) would not occur “but for” the proposed agency  
 25 action; and (2) are “reasonably certain to occur” based on “clear and substantial information.”  
 26 ESA 21, 59, 61. The rule applies the heightened “reasonably certain” standard to *all* effects of the  
 27 proposed action, including direct, indirect, interrelated, and interdependent effects, ESA 20,  
 28 whereas previously, the “reasonably certain” standard applied only to indirect and cumulative

1 effects of the proposed action, ESA2\_ 15813 (former definitions of “effects of the action” and  
2 “cumulative effects”). The Consultation Rule then pronounces that effects deemed to be  
3 “geographically remote” or “remote in time” from the proposed action, or that are “only reached  
4 through a lengthy causal chain,” do not satisfy the new “reasonably certain to occur” standard.  
5 ESA 61. Furthermore, in considering whether an effect of a proposed action is “reasonably  
6 certain to occur,” the action agency and the Services now may look to non-biological  
7 considerations such as “past experiences,” “existing plans for the activity,” and applicable  
8 “economic, administrative and legal requirements.” *Id.* Finally, the preamble sanctions  
9 piecemeal consultations: “a request for consultation on one aspect of a Federal agency’s exercise  
10 of discretion does not *de facto* pull in all of the possible discretionary actions or authorities of the  
11 Federal agency.” ESA 21.

12       These significant new limitations on the analyses of the effects of a proposed agency action  
13 violate both the letter and spirit of section 7 and the conservation purposes of the Act. 16 U.S.C.  
14 §§ 1531(b), (c)(1), 1536(a)-(c). Section 7 requires action agencies to consult with the Services if  
15 all or any part of a proposed action “may affect any listed species or critical habitat.” *W.*  
16 *Watersheds*, 632 F.3d at 495; *see* 43 Fed. Reg. 870, 871 (Jan. 4, 1978) (“Section 7’s mandatory  
17 directive is quite clear in requiring the initiation of consultation upon a determination that an  
18 activity or program may affect a listed species or critical habitat.”). The “may affect” trigger for  
19 consultation is a “relatively low threshold[,]” allowing an agency to “avoid the consultation  
20 requirement only if it determines that its action will have ‘no effect’ on a listed species or critical  
21 habitat.” *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012) (*en banc*).  
22 For agency actions that “may affect” listed species or critical habitat, the Services must evaluate,  
23 in a comprehensive biological opinion, the effects of the entire agency action, including short-  
24 term, long-term, site-specific, regional, and cumulative effects. 16 U.S.C. § 1536(b)(3)(A); *see*,  
25 *e.g.*, *Turtle Island Restor. Network v. U.S. Dep’t of Commerce*, 878 F.3d 725, 737-38 (9th Cir.  
26 2017); *NWF v. NMFS*, 524 F.3d at 934-35; *Pac. Coast Fed’n of Fishermen’s Ass’n v. U.S. Bureau*  
27 *of Reclam.*, 426 F.3d 1082, 1090-95 (9th Cir. 2005) (“*Pacific Coast IP*”); *Pacific Coast I*, 265  
28 F.3d at 1035-38; *Conner v. Burford*, 848 F.2d 1441, 1453-54, 1457 (9th Cir. 1988).

1           The Consultation Rule’s limit on section 7 analyses to effects that are both (1) a “but for”  
2 result of the federal agency action, and (2) “reasonably certain to occur” based on a variety of  
3 non-biological and unscientific factors, plainly violates section 7. In particular, the rule allows  
4 federal action agencies and the Services to narrowly define the scope of the proposed action and  
5 its effects and conduct a piecemeal, limited evaluation of the action’s adverse effects on listed  
6 species and critical habitat, thus ignoring many of the action’s true impacts, contrary to the ESA  
7 and governing case law.

8           For example, the “remote in time” and “geographically remote” language could be used to  
9 limit Section 7 consultation in cases where there is an “effect” on a listed species that may not be  
10 immediate but warrants consideration. For example, the operation of Federal dams on the west  
11 coast produces impacts to migratory salmon populations. Salmon travel hundreds of miles over  
12 time, and mortality may result from juvenile salmon encountering powerhouses or pumps during  
13 their outmigration that might not manifest until after the salmon enter the ocean. Under the  
14 Consultation Rule, Federal agencies might argue that this mortality would not count as “effects,”  
15 even if likely to occur, as a result of such “remoteness.”

16           The “reasonably certain to occur” requirement—which is “a stricter standard than  
17 ‘reasonably foreseeable,’” ESA 35—likewise flouts section 7 and the ESA’s overriding  
18 conservation purpose, which call for a *low* threshold for adverse effects that is *maximally*  
19 protective of species and habitat, 16 U.S.C. §§ 1531(b), (c)(1), 1536(a)(1); *see Karuk Tribe*, 681  
20 F.3d at 1027 (“*Any possible effect ... triggers the [section 7] requirement.*”) (emphasis in  
21 original). Moreover, the “reasonable certainty” factors give the Services unwarranted leeway to  
22 ignore climate change and resulting effects. As discussed *infra* Part II, it is certain that climate  
23 change will increasingly adversely affect listed species and habitat, although the *precise extent* of  
24 these impacts is not necessarily possible to predict with certainty.<sup>11</sup>

25           Significantly, the D.C. Circuit recently rejected an agency’s determination that is

26 <sup>11</sup> The “reasonable certainty” criteria also run counter to the ESA’s requirement that the Services  
27 must use the “best available science” in conducting consultations and cannot defer analysis or  
28 decisions simply because the information or outcome is not “reasonably certain.” *See* 16 U.S.C.  
§ 1536(a)(2), (c); *Conner*, 848 F.2d at 1454 (“incomplete information ... does not excuse the  
failure to comply with the statutory requirement of a comprehensive biological opinion”).

1 rulemaking had “no effect” based on a “no reasonable certainty” standard. *Am. Fuel &*  
2 *Petrochem. Mfrs. v. EPA*, 937 F.3d 559, 597-98 (D.C. Cir. 2019). The Court reasoned that the  
3 agency’s statement that certain impacts could not be attributed:

4 with reasonable certainty [to promulgation of the rule at issue] are not a “no effect”  
5 determination. The inability to attribute environmental harms “with reasonable  
6 certainty” to the ... Rule, is not the same as a finding that the ... Rule “will not  
7 affect” or “is not likely to adversely affect” listed species or critical habitat.

8 *Id.* at 598 (internal quotations and citations omitted). The Services’ revisions to the definition of  
9 “effects of the action” are thus contrary to section 7 of the ESA, the statute’s conservation  
10 purposes, and controlling case law.

11 **“Environmental Baseline” (50 C.F.R. § 402.02)**

12 Contrary to section 7, the ESA’s conservation mandate, and controlling case law, the  
13 Consultation Rule allows agencies to include any “ongoing agency activities or existing agency  
14 facilities that are not within the agency’s discretion to modify” as part of the “environmental  
15 baseline.” ESA 59. The baseline describes the condition against which the effects of a proposed  
16 agency action are measured in the section 7 consultation process. *Id.* This change likewise  
17 unlawfully limits both the type and extent of effects that are required to be analyzed as part of the  
18 proposed federal agency action. It thus also limits the type and extent of reasonable and prudent  
19 alternatives and mitigation measures that must be included as part of the proposed action to avoid  
20 jeopardy and adverse modification and reduce the project’s adverse effects on listed species and  
21 critical habitat. 16 U.S.C. §§ 1536(a)(2), (b)(3)(A), (b)(4).

22 The Ninth Circuit has expressly rejected the very approach adopted by the Consultation  
23 Rule, holding that the Services cannot minimize the effects of a federal agency action by  
24 classifying portions of that action as “ongoing” and/or “non-discretionary” and subsuming them  
25 within the environmental baseline. In *NWF v. NMFS*, for example, the Court invalidated a NMFS  
26 biological opinion that incorporated the allegedly “non-discretionary,” ongoing impacts of dam  
27 operations into the environmental baseline. 524 F.3d at 926, 928-29. The Court reasoned that the  
28 ESA does not permit “agencies to ignore potential jeopardy risks by labeling parts of an action  
non-discretionary,” and may not sweep “so-called ‘nondiscretionary’ operations into the

1 environmental baseline, thereby excluding them from the requisite ESA jeopardy analysis.” *Id.*;  
2 *see also San Luis & Delta Mendota Water Auth. v. Jewell*, 747 F.3d 581, 639-40 (9th Cir. 2014).

3 The D.C. Circuit likewise has held that FWS may not “establish[] the environmental  
4 baseline without considering the degradation to the environment caused by” the ongoing  
5 operation of a hydropower project, and that “attributing ongoing project impacts to the ‘baseline’  
6 and excluding those impacts from the jeopardy analysis” was inadequate under section 7. *Am.*  
7 *Rivers v. FERC*, 895 F.3d 32, 47 (D.C. Cir. 2018); *see also Cooling Water Intake Structure Coal.*  
8 *v. EPA*, 905 F.3d 49, 81 (2nd Cir. 2018) (noting that “[w]here the future operation of a regulated  
9 facility depends upon the discretion of the acting agency, the continued operation of that facility  
10 is not a ‘past’ or ‘present’ impact of a previous federal action” that is included in the  
11 environmental baseline) (citing *NWF v. NMFS*, 524 F.3d at 930-31). The Services’ inclusion of  
12 the effects of ongoing agency actions in the environmental baseline is thus contrary to settled law.

13 **Non-Binding Mitigation Measures (50 C.F.R. § 402.14(g)(8))**

14 The Consultation Rule adds a new unlawful provision to section 402.14(g)(8) providing that  
15 “[m]easures included in the proposed action or a reasonable and prudent alternative that are  
16 intended to avoid, minimize, or offset the effects of an action ... do not require any additional  
17 demonstration of binding plans.” ESA 60. This limits the implementation and enforcement of  
18 mitigation measures designed to reduce the adverse effects of a proposed agency action on listed  
19 species and critical habitat, in violation of section 7 and the Act’s conservation purposes. 16  
20 U.S.C. §§ 1531(b), (c)(1), 1536(a)(1), (a)(2), (b)(4). Contrary to the Services’ explanation for the  
21 rule, ESA 22, 45-50, mitigation measures must be binding and enforceable to ensure that: (1)  
22 federal action agencies actually satisfy their obligations under sections 7(a)(1) and 7(a)(2); (2) the  
23 “reasonable and prudent measures” in the incidental take statement required under section 7(b)(4)  
24 are actually implemented; and (3) there are measurable triggers for reinitiation of consultation if  
25 the federal agency does not comply. *See Ctr. for Biolog. Divers. v. BLM*, 698 F.3d 1101, 1115-16  
26 (9th Cir. 2012) (“*CBD v. BLM*”). Accordingly, the Ninth Circuit has recognized that federal  
27 agency mitigation commitments must be incorporated into the proposed action and be binding  
28 and enforceable. *See id.* at 1117; *NWF v. NMFS*, 524 F.3d at 935-36. The Ninth Circuit recently

1 reaffirmed that requirement in *Ctr. for Biolog. Divers. v. Bernhardt*, 982 F.3d 723 (9th Cir. 2020)  
2 (“*CBD v. Bernhardt*”), holding that vague, non-specific, and non-binding mitigation measures  
3 “are generally unenforceable under the ESA and thus cannot be relied upon.” *Id.* at 744. Thus,  
4 the mitigation provision is contrary to section 7.

#### 5 **Adoption of Other Agencies’ Biological Analyses (50 C.F.R. § 402.14(h)(3))**

6 The Consultation Rule unlawfully amends section 402.14(h)(3)(i) to allow the Services to  
7 adopt, as their own biological opinions, all or part of a federal action agency’s consultation  
8 initiation package. ESA 60. Only the Services, however, and not the federal action agency, are  
9 statutorily authorized to perform a biological analysis of the effects of the action and have the  
10 requisite biological expertise to do so. 16 U.S.C. § 1536(b)(3)(A); *Karuk Tribe*, 681 F.3d at 1020  
11 (“[T]he purpose of consultation is to obtain the expert opinion of wildlife agencies”); *accord*  
12 *Turtle Island Restor. Network v. NMFS*, 340 F.3d 969, 974 (9th Cir. 2003). As the Second Circuit  
13 has explained: “[t]he ESA requires the Services to *independently* evaluate the effects of agency  
14 action on a species or critical habitat.” *Cooling Water Intake Structure Coal.*, 905 F.3d at 80  
15 (emphasis added). The rule unlawfully permits the Services to abdicate their statutory  
16 consultation duty to nonexpert agencies in violation of section 7(b)(3)(A).

#### 17 **Reinitiation of Consultation Exemptions (50 C.F.R. § 402.16)**

18 Finally, the Consultation Rule adds a new, unlawful section 402.16(b), which exempts  
19 BLM from having to reinitiate consultation on a land management plan when a new species is  
20 listed or new critical habitat is designated in the plan area. ESA 60-61. The section 7  
21 consultation requirement applies on an ongoing basis to *all* federal agency actions over which the  
22 agency retains discretionary involvement or control. *Karuk Tribe*, 681 F.3d at 1024. In making  
23 that determination, the key issue is not whether the action is “complete,” but whether the federal  
24 agency has authority and discretion to modify its implementation of the action “for the benefit of  
25 a protected species.” *Id.* at 1021; *accord Turtle Island*, 340 F.3d at 974, 977; *NWF v. NMFS*, 524  
26 F.3d at 926-29 (obligation to consider effects of ongoing operations of dam, where Congress  
27 specified broad goals but agency retained significant discretion as to how to achieve those goals).

28 Applying the Act’s plain terms, in *Cottonwood Environmental Law Center v. U.S. Forest*

1 *Service*, 789 F.3d 1075 (9th Cir. 2015), the Ninth Circuit held that a federal agency “has a  
2 continuing obligation to follow the requirements of the ESA” where it has continuing regulatory  
3 authority over the action. *Id.* at 1087. Thus, the Court held that the U.S. Forest Service was  
4 required to reinitiate consultation on a management plan where FWS had revised a previous  
5 critical habitat designation to include National Forest land. *Id.* at 1087-88. The Court reasoned  
6 that “requiring reinitiation in these circumstances comports with the ESA’s statutory command  
7 that agencies consult to ensure the ‘continued existence’ of listed species.” *Id.* (emphasis in  
8 original). “[N]ew [critical habitat] protections triggered new obligations,” the Court explained,  
9 and the Forest Service could not “evade its obligations by relying on an analysis it completed  
10 before the protections were put in place.” *Id.* at 1088.

11 The Services do not—and indeed cannot—contend that the BLM does not retain sufficient  
12 discretionary involvement, authority, or control over land management plans to implement  
13 additional protections for species and habitat upon a new listing or critical habitat designation.  
14 Instead, the Services plainly admit that this rule change was designed to overrule the Ninth  
15 Circuit’s holding in *Cottonwood Environmental Law Center*, 789 F.3d 1075. ESA 52-53. But, as  
16 explained above, *Cottonwood* merely applies the requirements of the ESA itself. Consequently,  
17 the new rule limiting BLM’s obligations to reinitiate consultation is contrary to section 7’s  
18 requirement to insure no jeopardy and no adverse modification of critical habitat, as well as the  
19 ESA’s conservation mandate.

20 **C. The 4(d) Rule Is Contrary to the Conservation Purposes of the ESA.**

21 The 4(d) Rule abandons FWS’s decades-long policy of automatically extending section 9  
22 protections to all newly listed threatened species, and instead leaves such species without any  
23 section 9 protections unless and until FWS promulgates a species-specific section 4(d) rule. ESA  
24 11, 16. FWS’s 4(d) Rule thereby contravenes the ESA’s conservation mandate and policy of  
25 “institutionalized caution,” *Hill*, 437 U.S. at 178, because it inevitably will result in inadequate  
26 ESA protections for newly-listed threatened species.

27 Section 4(d) provides that “[w]henver any species is listed as a threatened species . . . , the  
28 Secretary *shall issue* such regulations as he deems necessary and advisable *to provide for the*

1 *conservation of such species,”* and may by regulation prohibit “with respect to any threatened  
 2 species” any act that is prohibited by ESA section 9 with respect to any endangered species. 16  
 3 U.S.C. § 1533(d) (emphases added). FWS asserts that it will satisfy the conservation purpose of  
 4 the ESA and section 4(d) by promulgating protective 4(d) rules for each individual threatened  
 5 species at the time of their listing. ESA 11, 13. But FWS simply does not have the capacity or  
 6 resources to promulgate species-specific 4(d) rules for each individual threatened species at the  
 7 time of listing. 16 U.S.C. § 1533(d). FWS’s stated intention to issue species-specific rules, which,  
 8 indeed, may or may not any include section 9 take prohibitions, ESA 16, is belied by given the  
 9 agency’s well-known history of significant listing decision backlogs,<sup>12</sup> and its increasingly limited  
 10 budget,<sup>13</sup> now further constrained by the Listing Rule’s requirement to compile and present  
 11 economic information. *See supra* Part I.A.

12 Rather, it is far more likely that FWS will infrequently, if not rarely, promulgate special rules  
 13 extending the section 9 take prohibition or other protections to newly listed or reclassified  
 14 threatened species. In fact, to date, FWS has adopted species-specific rules for only about 4.5% of  
 15 threatened species under its jurisdiction. ESA 76511. And even where species-specific rules are  
 16 adopted, there will likely be a significant delay during which no section 9 protections are in place.  
 17 Without interim protections, newly listed or reclassified threatened species will face significant  
 18 risk of harm, and parties that put threatened species in danger would be free from any  
 19 consequences. Both circumstances would upend the conservation mandate and precautionary

20 \_\_\_\_\_  
 21 <sup>12</sup> *See* ESA 91290 n.27 (GAO Listing Deadline Litigation Report at 5-18, reporting that 141  
 22 lawsuits involving 1,441 species were filed between fiscal year 2005 and 2015 alleging that the  
 23 Services failed to take actions within the ESA’s section 4 deadlines, most of which involved  
 24 missed deadlines to act on listing petitions); ESA 76507-10 (detailing history of listing backlog  
 and noting that, from 1983 to 2014, species have waited an average of 12 years to be listed under  
 the ESA); *see also In re Endangered Species Act Section 4 Deadline Litig.-MDL No. 2165*, 704  
 F.3d 972, 975 (D.C. Cir. 2013) (describing listing backlog).

25 <sup>13</sup> FWS’s listing budget of just over \$11 million decreased by more than \$7.75 million in FY 2020.  
 26 *See* FY 2020 INTERIOR BUDGET IN BRIEF, BUREAU HIGHLIGHTS, FWS, Detail of Budget Changes, at  
 27 BH-67, 68, [https://www.doi.gov/sites/doi.gov/files/uploads/2020\\_highlights\\_book.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/2020_highlights_book.pdf). The entire  
 28 FWS budget decreased from \$3.37 billion in FY 2019 to \$2.93 billion in FY 2020, with only \$2.85  
 billion requested for FY 2021. *See id.*, Appendix A, Comparison of 2018, 2019, and 2020 Budget  
 Authority, FWS, p. A-5, <https://www.doi.gov/sites/doi.gov/files/uploads/fy2021-bib-a0001.pdf>.

1 principle enshrined in the ESA, which FWS has implemented for decades by instituting default  
 2 protections for threatened species to keep them from sliding further toward endangerment and  
 3 extinction while the details of specially tailored rules, if any, are developed. *See* 16 U.S.C.  
 4 §§ 1531(b), (c)(1), 1536(a)(1); *Hill*, 437 U.S. at 178, 194.

5 FWS’s claim that the 4(d) Rule’s removal of section 9 protections is necessary to  
 6 “meaningfully recogniz[e]” the statutory distinction between endangered and threatened species  
 7 rings hollow. ESA 15. The D.C. Circuit already has rejected arguments that FWS’s prior 4(d)  
 8 “blanket” regulatory extension of all section 9 protections to newly-listed threatened species  
 9 impermissibly blurs the statutory distinction between endangered and threatened species. *See*  
 10 *Sweet Home Chapter of Cmty. for a Greater Or. v. Babbitt*, 1 F.3d 1, 6-8 (D.C. Cir. 1993)  
 11 (finding FWS’s former blanket rule was reasonable interpretation of the ESA).

## 12 **II. THE FINAL RULES ARE ARBITRARY AND CAPRICIOUS UNDER THE APA.**

13 In addition to violating the ESA’s statutory requirements, the Final Rules fail to meet the  
 14 basic standards for lawful agency rulemaking under the APA. *See State Farm*, 463 U.S. at 42-43.  
 15 The Services’ justifications lack evidentiary support and are belied by the administrative record,  
 16 which demonstrates that the Final Rules were a rushed, politically-driven effort to reward industry  
 17 groups and implement the Trump Administration’s nationwide deregulatory agenda, in deliberate  
 18 disregard of impacts on species and habitat that Congress mandated the Services to consider.  
 19 Accordingly, the Final Rules must be invalidated as arbitrary and capricious under the APA.

### 20 **A. The Services Failed to Adequately Explain or Justify the Final Rules as a** 21 **“Clarification” or “Streamlining” of Existing Procedures.**

22 As their overarching rationale, the Services repeatedly attempt, but utterly fail, to justify  
 23 their significant, substantive changes to their longstanding implementing regulations as an effort to  
 24 “clarify,” “streamline,” or “simplify” their procedures. *See, e.g.*, ESA 17, 19, 58, 62, 93. The  
 25 Services have failed to support that purported rationale with any evidence identifying specific prior  
 26 procedures in need of clarification or streamlining, or any specific alleged problems they were  
 27 trying to solve. Nor have the Services provided evidence that the Final Rules will in fact make  
 28 their procedures more streamlined or efficient. *See San Luis & Delta-Mendota Water Auth. v.*

1 *Locke*, 776 F.3d 971, 998 (9th Cir. 2014) (agency must “consider all relevant factors and offer an  
 2 explanation for its conclusion that is grounded in the evidence”). Indeed, despite the fact that each  
 3 of the Final Rules is “significant” under Executive Order 12,866, ESA 16, 57, 92,<sup>14</sup> and despite  
 4 OIRA’s repeated requests for a Regulatory Impact Analysis (“RIA”) required for significant  
 5 rulemakings, ESA2\_23317, ESA2\_27641, ESA2\_27655, ESA2\_28962, the Services failed to  
 6 prepare or release to the public any RIA or other cost-benefit assessment of the Final Rules.

7 Contrary to the Services’ proffered rationale, the record reflects that the Final Rules were  
 8 rushed through by high-level political appointees within the Department of the Interior—including,  
 9 in particular, Secretary Bernhardt<sup>15</sup>—solely to reduce the ESA’s alleged regulatory burdens at the  
 10 behest of regulated industry. *See, e.g.*, ESA 2204-10, 2214-27, 2230-32, 2369-73, 2425, 2572-73,  
 11 2656-58, 2668, 2713-15, 2847-54, 2869-71. The Services themselves admit that each of the Final  
 12 Rules “is an Executive Order 13,771 deregulatory action.” ESA 16, 57, 92; *see also* ESA2 17358  
 13 (identifying Listing Rule and Consultation Rule as “Upcoming EO 13771 Deregulatory” Actions).  
 14 And the record further demonstrates that NMFS was not even aware that the Final Rules were  
 15 being developed by Interior until OIRA sought to add the rules to its Unified Regulatory Agenda,<sup>16</sup>

16 <sup>14</sup> *See* Executive Order 12,866, §§ 3(f)(1), 6(a)(3)(C), 58 Fed. Reg. 51,735, 51,738, 51,741 (Oct. 4, 1993).

17 <sup>15</sup> *See, e.g.*, ESA2\_10208 (“working under a very compressed time frame from DOI leadership”);  
 18 ESA2\_2120 (“DOI wants regs out in January which would mean we would all have to write these  
 19 in December”); ESA2\_2364-65 (“I have suggested that the Spring agenda would be the better  
 20 option, but David [Bernhardt] and Todd [Willens] said DOI is adamant that it be listed in the Fall  
 21 agenda. I suspect that is driven by Secretary Zinke”); ESA2\_3466 (“High level folks at DOI to  
 22 attend (Bernhardt) and from what I’ve heard they will direct staff as to what they want changed”);  
 23 ESA2\_4865 (regulatory drafting meeting agenda from David Bernhardt); ESA2\_5153 (“fast  
 24 tracking already happening”); ESA2\_5239 (noting “very tight timeline”); ESA2\_7456 (“So the  
 25 push is coming from DOI (It is my understanding that this is coming from David Bernhardt)”);  
 26 ESA2\_15305 (“At the request of the DOI Deputy Secretary, the agencies are trying to prepare two  
 27 proposed rules to submit to OMB by the end of January”); ESA2\_21974 (“David and Stu  
 28 discussed those comments this weekend, and the attached reflects their agreement on how to  
 proceed with the 402 and 424 rules”).

<sup>16</sup> *See, e.g.*, ESA2\_1544 (“I’m truly confused about Stu’s behavior on this one. He knows these  
 are joint regulations and that we are equal partners with DOI on implementing this work”);  
 ESA2\_1557 (“OIRA flagged that there are a couple of de-regs that FWS is planning for in regards  
 to its consultation regulations and its listing/CH designation regs. I would guess that at least the  
 latter is a joint regulation with NMFS? If so, have we heard about this yet?”); ESA2\_2175 (noting  
 “DOI’s desire to list (and have us list) proposed changes to ESA rules on the unified agenda,  
 without discussing with us the substance of those changes”); ESA2\_2132 (“Stu [Levenbach] - we

1 and that career staff expressed repeated frustration regarding their inability to affect the rushed  
2 rulemaking process.<sup>17</sup>

3 Simply put, nothing in the record supports the Services' pretextual claim that the Final Rules  
4 aimed at clarifying or streamlining existing procedures. *Cf. New York*, 139 S. Ct. at 2575  
5 (rejecting Secretary of Commerce's "sole stated reason" for adding citizenship question to census  
6 where "evidence tells a story that does not match the Secretary's explanation for his decision" and  
7 Secretary's "sole stated reason . . . seems to have been contrived").

8 **B. The Services Failed to Adequately Evaluate or Justify Their Reasons for**  
9 **Each Individual Rule Change.**

10 The Services also arbitrarily ignored many important consequences of each individual rule  
11 change on listed species and their habitat, and failed to provide an adequate justification for each  
12 change, let alone the "more detailed justification" required for contradicting their prior policies or  
13 approach. *Fox*, 556 U.S. at 515.

14 **1. The Listing Rule Arbitrarily Constrains Listing Determinations and**  
15 **Limits Critical Habitat Designation.**

16 **"Presentation of Economic or Other Information" (50 C.F.R. § 424.11(b))**

17 The Listing Rule arbitrarily adds economic impact analyses to the listing process without  
18 any reasoned basis. ESA 66, 94. First, by injecting economic considerations into the biological-  
19 based listing process, the Services relied on factors Congress did not intend for them to consider  
20 and entirely "failed to consider important aspects of the problem" at issue—determining whether  
21 a species is in fact biologically threatened based on the best available existing science. *See State*  
22 *Farm*, 463 U.S. at 43; *see also* 16 U.S.C. §§ 1533(a)(1), (b)(1)(A). It defies reason that the  
23 Services would go to significant efforts to compile—and then entirely ignore—economic  
24 information, as they insist they will do to justify their evasion of the ESA's plain bar on  
25 considering the economic impacts of listing, *supra* Part I.A. ESA 66-68. But, even taking the  
26 \_\_\_\_\_  
still have not received any materials from DOI on these rules so we are not exactly sure what  
actions are being proposed").

27 <sup>17</sup> *See, e.g.*, ESA2\_3417 (FWS "would likely have no ability to stop/modify any of this");  
28 ESA2\_54918 ("Given how the proposed regs played out, its unlikely internal comments will have  
much influence in developing any final regulations").

1 Services at their word, they fail to consider how devoting substantial additional time and  
2 resources to compile and present such information will not further delay their notoriously  
3 backlogged listing decisions and consequently harm at-risk species. *See supra* note 12. Worse  
4 still, the Services expressly decline to provide any “framework or guidelines” for assessing and  
5 presenting economic impacts, ESA 68, thus not only failing to consider, but also affirmatively  
6 obscuring, the true impact of their new process on the Act’s core requirements.

7 Second, the Services offer no reasoned basis for their drastic, unlawful change. The  
8 ultimately futile effort of preparing and presenting economic impact information would plainly  
9 undermine the Services’ proffered reason for promulgating the Listing Rule to “streamline” the  
10 regulations, ESA 93, inevitably delaying listing decisions notwithstanding their purported, but  
11 unsupported, “inten[t]” to comply with court-ordered listing deadlines, ESA 68. Nor can the  
12 Services justify the change—over the objections of “most commenters,” ESA 65—on the basis of  
13 an alleged interest in “increased transparency” from “some” unnamed members of Congress and  
14 the public. ESA 67.<sup>18</sup> Indeed, no such interest could authorize the Services to evade the ESA’s  
15 specific prohibition on the inclusion of economic impacts in listing determinations, 16 U.S.C.  
16 § 1533(b)(1)(A); *supra* Part I.A.

17 **“Foreseeable Future” (50 C.F.R. § 424.11(d))**

18 The Services failed to assess how their new interpretation of “foreseeable future” constrains  
19 their ability to list and protect species from scientifically credible existential threats, again failing  
20 to consider an important aspect of the listing process. ESA 94. Specifically, the Listing Rule’s  
21 new requirement that both threats and species’ responses thereto must be “more likely than not”  
22 allows the Services to discount potentially devastating threats that may fall below the Services’  
23 arbitrary 50% threshold including, in particular, climate change. The fact that climate change will

24 \_\_\_\_\_  
25 <sup>18</sup> Tellingly, in the Listing Rule, the Services pivoted to this last-gasp rationale from the rationale  
26 offered in the proposed rule. *Compare* ESA 229 (relying on alleged “support” for transparency in  
27 “statutes and executive orders governing the rulemaking process”), *with* ESA 68 (disclaiming  
28 reliance on such authorities). And for good reason. *See* H.R. CONF. REP. No. 97-835, at 20 (1982)  
(noting “economic analysis requirements of Executive Order 12,291, and such statutes as the  
Regulatory Flexibility Act and the Paperwork Reduction Act, *will not apply* to any phase of the  
listing process”).

1 have, and indeed is having, catastrophic impacts on species and their habitat is not in doubt; it is  
2 certain. According to the National Park Service, 35% of species in the United States could  
3 become extinct by 2050 due to global climate change. ESA 91293 n.29.<sup>19</sup> Though there may be  
4 several plausible projections of climate impacts predicting somewhat different effects on species  
5 or habitat within different timeframes, such threats cannot be arbitrarily discounted or ignored in  
6 assessing the overall “likelihood” that a species will become endangered in the “foreseeable  
7 future.” 16 U.S.C. § 1532(20).

8 As the Ninth Circuit has explained, “[t]he fact that climate projections” or other modeling  
9 “may be volatile does not deprive those projections of value in the rulemaking process” where the  
10 Services have used a reasonable methodology for addressing that volatility and explained its  
11 shortcomings. *Alaska Oil & Gas Ass’n v. Pritzker*, 840 F.3d 671, 680 (9th Cir. 2016); *see also*  
12 *Ctr. for Biolog. Divers. v. Zinke*, 900 F.3d 1053, 1072 (9th Cir. 2018) (FWS must explain why  
13 climate change uncertainty favors not listing arctic grayling given evidence of warming water  
14 temperatures and decreasing water flows); *Greater Yellowstone Coal. Inc. v. Servheen*, 665 F.3d  
15 1015, 1028 (9th Cir. 2011) (“It is not enough for the [FWS] to simply invoke ‘scientific  
16 uncertainty’ to justify its action”). The Services’ conclusory statement they will still consider  
17 available climate data is unavailing, as it fails to recognize that their new definition raises an  
18 arbitrary, quantitative bar against doing so. ESA 74.

19 The Services also provide no reasoned basis for this damaging change. Again, rather than  
20 “clarify” the listing process, ESA 93, the “foreseeable future” definition is replete with ambiguity  
21 and affords them unfettered discretion to disregard profound threats. *See supra* Part I.A. Nor  
22 does the Listing Rule merely codify a 2009 opinion from the Department of the Interior’s Office  
23 of the Solicitor (“2009 Guidance”), as the Services claim. ESA 229. Unlike the Listing Rule, the  
24 2009 Guidance recognizes that the Services must sometimes make listing decisions extrapolating  
25 from limited data in line with the Act’s overarching conservation purpose. ESA 91294 n.33.

26  
27  
28 <sup>19</sup> *See also id.* (former FWS Director stating that rapidly changing climate is a principal emerging threat to species nationwide).

1           **“Recovery in Delisting” (50 C.F.R. § 424.11(e))**

2           The Services’ sole rationale for eliminating species recovery as a basis for delisting—that  
3 the change would “more clearly align” the regulations with the Act—fails to provide the reasoned  
4 basis required by the APA. ESA 230. As discussed *supra* Part I.A., the Service arbitrarily  
5 ignores the ESA’s overarching conservation purpose and its specific provisions making recovery  
6 a prerequisite to delisting. 16 U.S.C. §§ 1532(3), 1533(f)(1)(B)(ii).

7           **“Not Prudent Determinations” (50 C.F.R. § 424.12(a))**

8           In drastically expanding the “not prudent” exception to critical habitat designation, the  
9 Services failed to consider important aspects of critical habitat designation and failed to provide  
10 any reasoned explanation for their changed position. ESA 63, 95.

11           First, the Services failed to consider how their vastly expanded new exceptions to critical  
12 habitat designation will reduce the number and extent of such designations and thereby harm  
13 listed species and their habitat, contrary to the ESA. As Congress recognized long ago, “[t]he  
14 loss of habitat for many species is universally cited as the major cause for the extinction of  
15 species worldwide.” H.R. Rep. No. 95-1625, at 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453,  
16 9455. But exception (ii) drives a gaping loophole in the Act’s critical habitat protections by  
17 eliminating critical habitat designations where actions adopted during the section 7 consultation  
18 process cannot *by themselves* mitigate threats to species and habitat—including, perhaps most  
19 troublingly, climate change. *See* ESA 84 (explaining that this exception now covers “species  
20 experiencing threats stemming from melting glaciers, sea level rise, or reduced snowpack but no  
21 other habitat-related threats”). In making that change, the Services arbitrarily dismissed as  
22 “incidental” the many benefits of critical habitat designation beyond the section 7 consultation  
23 requirement, and failed to consider the vital roles of critical habitat designations in, among other  
24 things, educating the public and State and local governments about the importance of certain  
25 areas to listed species, assisting in species recovery planning efforts, and establishing pre-  
26 consultation protection plans. *Id.*; *see Conserv. Council for Haw. v. Babbitt*, 2 F. Supp. 2d 1280,  
27 1288 (D. Haw. 1998) (discussing “significant substantive and procedural protections” from  
28 critical habitat designation); 81 Fed. Reg. at 7,414-15 (describing “several ways” critical habitat

1 “can contribute to [species] conservation”).

2 The Services also arbitrarily failed to consider the impact on listed species of their vague  
3 new exception (iii) for critical habitat that provides “no more than negligible conservation value”  
4 to species “occurring primarily outside” the United States, or their exceptionally broad catch-all  
5 in exception (v), where the Services “otherwise determine[] that designation of critical habitat  
6 would not be prudent.” ESA 95. As the Ninth Circuit has recognized, it is arbitrary and  
7 capricious to expand “the narrow statutory exception for imprudent designations into a broad  
8 exemption” for almost any reason. *NRDC v. DOI*, 113 F.3d at 1126.

9 And, certainly, the Services’ singular aim to “reduce the burden of regulation” cannot  
10 supply the reasoned basis for unlawfully expanding the “not prudent” exception at the expense of  
11 listed species and their habitat, in direct contravention of the ESA’s statutory purpose and  
12 commands. ESA 84, 231. Nor can the Services rely on their passing, unconvincing assurance  
13 that “not prudent” determinations will purportedly be “rare,” given the plain breadth of the new  
14 exceptions. ESA 83, 231. Indeed, the Services made no effort to square that hollow claim with  
15 their sweeping assertions that the regulation allows the Services to skip critical habitat  
16 designation in a variety of circumstances, including whenever a federal action agency cannot  
17 singlehandedly mitigate the impacts of climate change on a species’ habitat. ESA 84-85.

18 **“Unoccupied Critical Habitat” (50 C.F.R. § 424.12(b)(2))**

19 The Services wholly failed to consider the effects on listed species of their new, stringent  
20 limitations on designating unoccupied critical habitat, which require the Services to first find that  
21 currently occupied habitat is inadequate for species conservation and then additionally determine  
22 that “there is a *reasonable certainty both* that the area will contribute to the conservation of the  
23 species *and* that the area contains one or more of those physical or biological features essential to  
24 the conservation of the species.” ESA 95 (emphasis added). In thus restricting designation of  
25 such habitat, the Services failed to contend with the fact that, if a species has been listed, it is  
26 virtually certain that it no longer occupies habitat that it once occupied, but that remains critical to  
27 its recovery. *See* 81 Fed. Reg. at 7,435 (“The Services anticipate that critical habitat designations  
28 in the future will likely increasingly use the authority to designate specific areas outside the

1 geographic area occupied by the species at the time of listing”). The Services also failed to  
2 address the fact that essential, but currently unoccupied, degraded habitat may need to be restored  
3 to enable a species to recover or even survive.

4 Additionally, with this change, the Services have again overlooked the dire effects of  
5 climate change—perhaps the single largest threat to species and their habitat. The Services  
6 explained in 2016 that “[a]s the effects of global climate change continue to influence distribution  
7 and migration patterns of species, the ability to designate areas that a species has not historically  
8 occupied is expected to become increasingly important” to ensure connectivity between habitats  
9 and protect movement corridors and emerging habitat for species experiencing range shifts in  
10 latitude or altitude. 81 Fed. Reg. at 7,435; *cf. Conserv. Council for Haw.*, 2 F. Supp. 2d at 1288;  
11 *see also* ESA 91299 n.40 (describing habitat shifts wrought by climate change). But the Services  
12 nowhere consider or explain how prioritizing occupied habitat and demanding a “reasonable  
13 certainty” that unoccupied habitat *currently* contain essential features will promote, let alone not  
14 actively hinder, conservation of species facing such catastrophic threats.

15 Further, the Services failed to provide any reasoned explanation for departing from their  
16 prior approach to designating unoccupied critical habitat. ESA 65. Their primary rationale—the  
17 Supreme Court’s decision in *Weyerhaeuser Co. v. FWS*, 139 S. Ct. 361 (2018)—provides no  
18 support for devaluing unoccupied critical habitat. ESA 64. There, the Court held only that an  
19 area of critical habitat (whether occupied or unoccupied) must first fall within the broader  
20 category of “habitat” to qualify as “critical habitat.” *Weyerhaeuser*, 139 S. Ct. at 369. But the  
21 court neither defined the term “habitat” nor rejected FWS’s previous contention in that case  
22 (which was consistent with the ESA but is now directly contradicted by the Listing Rule) that  
23 unoccupied habitat *need not* currently contain physical or biological features that are essential to  
24 the conservation of the species in order to be designated as critical habitat. *Id.* at 368-69.

25 **2. The Services Failed to Consider Relevant Factors and Effects of the**  
26 **Consultation Rule or to Provide Reasoned Explanations for Their**  
27 **Myriad Drastic Changes.**

28 **“Destruction or Adverse Modification” of Critical Habitat (50 C.F.R. § 402.02)**

The Services failed to consider how revising the definition of “destruction or adverse

1 modification” to require that an action “appreciably diminishes the value of critical habitat *as a*  
2 *whole*,” and to eliminate consideration of the alteration of “the physical or biological features  
3 essential to the conservation of a species,” would unreasonably raise the bar for triggering the  
4 important species and habitat protections afforded by the section 7 consultation process. ESA 25,  
5 59 (emphasis added); *see supra* Part I.B. First, the Services failed to consider the impacts on  
6 species of making “destruction or adverse modification” determinations “at the scale of the entire  
7 critical habitat designation,” and not any “less extensive scale” under the new “as a whole”  
8 standard. ESA 24, 209. The Services admits that, under their prior practice, “local impacts could  
9 indeed be significant” and trigger section 7 consultation, yet they failed to explain this change of  
10 position. ESA 26.

11 The Services likewise failed to offer any reasoned basis for the changes. Their conclusory  
12 and incorrect assertion that the “as a whole” language simply “clarifies” pre-existing practice does  
13 not assist them. The Services referenced the “as a whole” language only in the preamble to their  
14 2016 rule to explain the importance of considering impacts on “all areas to be affected directly or  
15 indirectly by the Federal action and not merely the immediate area involved in the action.” 81  
16 Fed. Reg. at 7,221. But the Services did not sanction wholly *ignoring* potentially significant  
17 localized impacts in the consultation process, as they now do. ESA 26. The Services also failed  
18 to offer a reasoned explanation for eliminating the requirement to consider the alteration of “the  
19 physical or biological features essential to the conservation of a species,” which they  
20 determined—only four years ago—was necessary to “highlight certain types of alterations that  
21 may not be as evident as direct alterations” and to “provides clarity and transparency to the  
22 definition.” 81 Fed. Reg. at 7,219. The Services did not explain the nature of the purported  
23 “controversy among the public and many stakeholders” they claim justifies the rule, how any  
24 such controversy has affected implementation of the Act, or, most importantly, how deleting the  
25 language quoted above will adversely affect listed species. *See* ESA 28.

26 **“Effects of the Action” (50 C.F.R. §§ 402.02, 402.17)**

27 The Services failed to consider the relevant factors or provide a reasoned explanation for  
28 changes to the definition of “effects of the action,” which significantly limit both the type and

1 extent of effects considered during the consultation process. *See supra* Part I.B. First, the  
2 Services altogether failed to evaluate how the changes will affect section 7 protections for listed  
3 species and critical habitat going forward, ignoring or minimizing a wide variety of agency  
4 impacts on listed species and critical habitat and associated mitigation measures.

5       Once again, the Services provided only the vague excuse that these changes are intended to  
6 simplify the definition and “reduce confusion” regarding how the Services identify relevant  
7 effects of a proposed action, because, they claim, the prior regulations “occasionally produced  
8 determinations that were inconsistent or had the appearance of being too subjective.” ESA 19-20,  
9 31. But the Services did not explain what the confusion was or how the changes would lessen it,  
10 or offer any evidence or analysis demonstrating inconsistent application. In fact, the Services’  
11 new requirements that all effects of a federal agency action must be a “but for” cause of the action  
12 and be “reasonably certain to occur” based upon “clear and substantial information” actually  
13 undermine their purported rationales because those changes only further confuse the section 7  
14 effects analysis. Indeed, the Services admit that the expanded concept of reasonable certainty  
15 (now requiring reasonable certainty not only for indirect and cumulative effects but also for direct  
16 effects) is vague, and they fail to explain how expanding its use will reduce, and not exacerbate,  
17 inconsistency and subjectivity in agencies’ section 7 determinations. ESA 20.<sup>20</sup>

18       **“Environmental Baseline” (50 C.F.R. § 402.02)**

19       The Services also failed to consider how inclusion of “ongoing agency activities or existing  
20 agency facilities” within the “environmental baseline,” and exclusion of such activities and  
21 facilities from the section 7 effects analysis of the proposed agency action, will significantly  
22 reduce protections for species and habitat afforded by the section 7 consultation process. *See*  
23 *supra* Part I.B. While the Services again claim to be addressing unspecified “confusion” on this  
24 issue, ESA 21, the Ninth Circuit has already made clear that the “effects of the action” must  
25 include *all* effects of an ongoing federal action subject to section 7 consultation, and “non-  
26 discretionary” activities cannot be subsumed into the environmental baseline. *See, e.g., San Luis*

27 <sup>20</sup> The Services’ new definition appears to be nothing more than a reprisal of a 2008 definition,  
28 also advocated by Secretary Bernhardt, which was ultimately rejected by Congress and withdrawn  
by the Services. *See* 74 Fed. Reg. 20,421 (May 4, 2009).

1 & *Delta-Mendota Water Auth.*, 747 F.3d at 639-40. And FWS itself has refuted the Services’  
2 rationale, explaining that the prior regulations contained “currently understood, and practiced  
3 concepts” which “ha[ve] never created controversy or inconsistent findings.” ESA2\_118019.

4 **Non-Binding Mitigation (50 C.F.R. § 402.14(g)(8))**

5 The Services failed to consider that eliminating requirements to ensure that any mitigation  
6 measures are binding and enforceable will reduce implementation and enforceability of such  
7 measures, to the detriment of listed species and critical habitat. That risk is precisely why the  
8 Ninth Circuit has repeatedly rejected the Services’ reliance on non-binding measures and required  
9 mitigation to include “specific and binding plans.” *See, e.g., NWF v. NMFS*, 524 F.3d at 935-36;  
10 *CBD v. Bernhardt*, 982 F.3d at 743-44.

11 Nor, again, do any of the Services’ justifications hold up. The Services’ assertion that  
12 consultation can be reinitiated if the federal action agency fails to carry out the mitigation  
13 measures does not account for the lack of enforceability of such measures necessary to trigger  
14 reinitiation. ESA 47-48; *see CBD v. BLM*, 698 F.3d at 1114-16 (explaining role of enforceable,  
15 binding mitigation measures in providing triggers for reinitiation of consultation). Here, too, the  
16 Services failed to explain how the regulation will “improve the availability and quality of  
17 information” or “resolve confusion.” ESA 46-47.

18 **Expedited Consultations (50 C.F.R. § 402.14(l))**

19 The Services provided no evidence to support their claim that the new “expedited  
20 consultation” process “will benefit species and habitats by promoting conservation ... through  
21 improved efficiencies in the section 7 consultation process,” nor did they provide any explanation  
22 as to how this expedited process “will still allow for the appropriate level of review.” ESA 51.  
23 *See Encino*, 136 S. Ct. at 2126 (unexplained change is arbitrary and capricious). While claiming  
24 that “many” projects that “have minimal adverse impacts” would qualify for the new expedited  
25 consultation procedure, the Services identify just one such example and provide no qualifying  
26 criteria for such projects. ESA 51. The lack of any appropriate guidelines on this process, such  
27 as limiting it to projects where the primary purpose is the conservation of listed species with a  
28 successful record of implementation, as exists in current FWS guidance, ESA2\_2731-37, will

1 only lead to further confusion and arbitrary application of the regulation.

2 **Reinitiation of Consultation Exemptions (50 C.F.R. § 402.16)**

3 The Services also failed to consider how exempting BLM land management plans from the  
 4 reinitiation of consultation requirements upon new species listings or critical habitat designations  
 5 would adversely affect listed species and critical habitat, and failed to provide a reasoned  
 6 explanation for this change. For example, the Services asserted that reinitiation of consultation on  
 7 federal management plans “does little to further” the ESA’s conservation goals because such  
 8 plans have “no immediate on-the-ground effects,” but the Services failed to explain or justify that  
 9 statement. ESA 54. Contrary to this conclusory assertion, the effects of resource management  
 10 plans can be “immediate and sweeping.” *Or. Nat. Desert Ass’n v. BLM*, 625 F.3d 1092, 1123 (9th  
 11 Cir. 2010); *see also Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1053 (9th Cir. 1994)  
 12 (management plans “have an ongoing and long-lasting effect even after adoption”). And the  
 13 Services wholly fail to support their final claim that this new exemption “will enable an action  
 14 agency to better synchronize its actions and programs with the conservation ... needs of listed and  
 15 proposed species.” ESA 53. While the Services’ note that specific actions taken under these  
 16 plans may be subject to later section 7 consultation, ESA 52, site-specific review is no substitute  
 17 for programmatic consultation on an entire plan. *See Pac. Rivers*, 30 F.3d at 1053-56 (discussing  
 18 importance of consultation on programmatic plans that guide future site-specific actions).

19 **3. FWS Failed to Consider How the 4(d) Rule Will Place Species at Risk**  
 20 **and Provided No Reasoned Explanation for the Abrupt Reversal of Its**  
 21 **Decades-Long Policy.**

22 FWS failed to consider the harm its removal of the longstanding blanket section 9  
 23 protections will cause to threatened species. As discussed *supra* Part I.C., FWS’s notorious  
 24 backlog of listing decisions, combined with its limited and diminished budget, do not provide it  
 25 with the capacity or resources to reliably and timely promulgate species-specific 4(d) rules upon  
 26 listing or reclassifying species as threatened. And, yet, the 4(d) Rule lacks any acknowledgement  
 27 or discussion of FWS’s resource constraints or the increased workload and delay associated with  
 28 conducting species-by-species assessments and promulgating special rules for all newly-listed  
 threatened animals or plants as necessary to adequately protect such species in the absence of the

1 blanket take prohibition. FWS’s failure to consider that critical aspect of species listing  
2 undermines the ESA’s overriding conservation purpose and will harm imperiled species.

3 Moreover, FWS’s only justifications for the 4(d) Rule—to “meaningfully recogniz[e]” the  
4 statutory distinction between endangered and threatened species and to align FWS’s policy with  
5 that of NMFS—are insufficient and unavailing. ESA 15; ESA2\_51586. As discussed *supra* Part  
6 I.C, the D.C. Circuit already has rejected that argument. *See Sweet Home*, 1 F.3d at 6-7. Nor does  
7 FWS’s alleged intent to align its practice with that of NMFS provide sufficient justification.  
8 NMFS has jurisdiction over, and manages fewer than, one hundred ESA-listed species in the  
9 United States,<sup>21</sup> with a 2019 budget of more than \$118.3 million for their protection and  
10 management, including listing.<sup>22</sup> By contrast, FWS manages 1,666 ESA-listed species in the  
11 United States,<sup>23</sup> yet FWS’s 2019 budget for ESA-listed species resource management was just  
12 \$247.8 million, of which only \$18.8 million was for listing.<sup>24</sup> Thus, while NMFS may have the  
13 capacity and resources to promulgate species-specific rules with each new threatened species  
14 listing, FWS simply does not. Indeed, to date, FWS has adopted specified-specific rules for only  
15 about 4.5% of threatened species under its jurisdiction. ESA 76511. FWS failed to provide any  
16 explanation for how it will overcome this budgetary hurdle and ensure protection of listed species.

17 **III. THE SERVICES FAILED TO PROVIDE NOTICE AND COMMENT ON ASPECTS OF THE FINAL**  
18 **RULES THAT ARE NOT A “LOGICAL OUTGROWTH” OF THE PROPOSED RULES.**

19 The APA provides that an agency action undertaken without adequate notice and comment  
20 is “arbitrary or an abuse of discretion.” 5 U.S.C. § 706(2)(A), *see also NRDC v. EPA*, 279 F.3d  
21 1180, 1186 (9th Cir. 2002). As the Ninth Circuit has acknowledged, notice is insufficient under  
22 the APA where the final rule is not a “logical outgrowth” of the proposal. *See, e.g., Empire*

23 <sup>21</sup> *See* NOAA Fisheries Endangered Species Conservation,  
24 <https://www.fisheries.noaa.gov/topic/endangered-species-conservation> (NMFS has jurisdiction  
25 over 165 endangered and threatened marine species, including 66 foreign species)  
(last visited Dec. 21, 2020).

26 <sup>22</sup> *See* NOAA, 2020 Budget Summary,  
27 <https://www.noaa.gov/sites/default/files/atoms/files/FY2020-BlueBook.pdf>, at p. 94.

28 <sup>23</sup> FWS, *Environmental Conservation Online System, Listed Species Summary*,  
<https://ecos.fws.gov/ecp/report/boxscore> (FWS has jurisdiction over a total of 2,360 ESA-listed  
species, 694 of which are foreign species) (last visited Dec. 21, 2020).

<sup>24</sup> *See* FWS, 2020 Budget Overview,  
[https://www.doi.gov/sites/doi.gov/files/uploads/fy2020\\_bib\\_bh061.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/fy2020_bib_bh061.pdf), at p. BH-67.

1 *Health Found. for Valley Hosp. Ctr. v. Azar*, 958 F.3d 873, 882-83 (9th Cir. 2020). In evaluating  
2 whether the final rule is a “logical outgrowth” of the proposed rule, courts evaluate “whether  
3 interested parties could have anticipated the final rulemaking” or whether, instead, “a new round  
4 of notice and comment would provide the first opportunity for interested parties to offer  
5 comments that could persuade the agency to modify its rule.” *Id.* Here, at least two aspects of the  
6 Final Rules could not have been anticipated from the proposed rules and, therefore, were  
7 promulgated without adequate notice and comment in violation of the APA.

8 First, the Listing Rule’s definition of unoccupied critical habitat imposes several additional  
9 requirements and restrictions that appeared nowhere in, and were not foreseeable from, the  
10 proposed rule. The Services originally proposed that “for an unoccupied area to be considered  
11 essential, the Secretary must determine that there is a reasonable likelihood that the area will  
12 contribute to the conservation of the species,” ESA 235; set out a three-part test for meeting that  
13 standard; and provided that an unoccupied area could be designated in lieu of occupied habitat if  
14 doing so would lead to more “efficient” species conservation. ESA 232, 235.

15 The final Listing Rule, however, fundamentally raised the bar even higher for designating  
16 unoccupied critical habitat by adopting a “reasonable certainty” standard in place of the  
17 “reasonable likelihood” proposal, wholly removing the three-part test for meeting that standard,  
18 and eliminating the proposal’s “efficient” conservation criterion. ESA 63. And the Listing Rule  
19 added a new requirement that an unoccupied area must “contain[] one or more of those physical  
20 or biological features essential to the conservation of the species,” *id.*—a complete reversal from  
21 the Services’ long-held position, in line with the Act, that unoccupied critical habitat does *not*  
22 have to include such features, ESA 65; *see* 16 U.S.C. § 1532(5)(A)(ii). Thus, the Listing Rule’s  
23 unoccupied habitat provisions are not a “logical outgrowth” of the Service’s proposal, in violation  
24 of the APA. *See Env’tl. Integrity Project v. EPA*, 425 F.3d 992, 996-98 (D.C. Cir. 2005) (rule  
25 violated logical outgrowth test when it altered agency’s previous interpretation without notice).

26 Second, the Consultation Rule raised the bar for determining that the effects of an action are  
27 reasonably certain to occur by introducing—for the first time—the requirement that such a  
28 conclusion be based upon “clear and substantial information.” ESA 20. The Services’ new,

1 higher evidentiary standard was an unforeseeable departure from the proposed rule. The  
2 proposed rule relied upon the Service’s position in previous rulemakings that the “reasonably  
3 certain to occur” standard does *not* require a guaranteed outcome, but merely required that the  
4 effect be “more than a mere possibility,” and that the Services “establish a rational basis for [a]  
5 finding.” ESA 212. And, contrary to the Services’ claim, ESA 35-36, an agency “cannot  
6 bootstrap notice from a comment” requesting further specificity of the “reasonably certain to  
7 occur” requirement. *Fertilizer Institute v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991) (citation  
8 omitted). Rather, the agency itself bears the burden of “fairly appris[ing] interested persons of the  
9 subjects and issues before the [a]gency,” *NRDC v. EPA*, 279 F.3d at 1186, particularly where, as  
10 here, changes made in finalizing a rule represent a significant departure from past agency  
11 practice. *Env’tl Integrity Project*, 425 F.3d at 996-98.

#### 12 **IV. THE SERVICES VIOLATED NEPA BY FAILING TO PREPARE AN EIS ON THE FINAL RULES.**

13 The Services violated NEPA by disregarding their obligation to analyze and disclose the  
14 significant environmental impacts of the Final Rules. NEPA is the “basic national charter for the  
15 protection of the environment,” 40 C.F.R. § 1500.1(a),<sup>25</sup> and requires the preparation of a detailed  
16 environmental impact statement (“EIS”) for any “major federal action significantly affecting the  
17 quality of the human environment,” 42 U.S.C. § 4332(2)(C), including “new or revised agency  
18 rules [and] regulations,” 40 C.F.R. § 1508.18(a). An agency may only avoid its statutory duty to  
19 evaluate the environmental impact of its proposed action in “certain narrow instances” where that  
20 action falls under a defined categorical exclusion (“CE”). *See Coal. of Concerned Citizens v.*  
21 *Fed. Transit Admin. of U.S. Dep’t of Transp.*, 843 F.3d 886, 902 (10th Cir. 2016). Here, the Final  
22 Rules are unquestionably major federal actions that require preparation of an EIS, and the  
23 Services unlawfully and inexplicably relied on an inapplicable categorical exclusion for rules that  
24 are of a legal, technical, or procedural nature. ESA 17 (4(d) Rule), 58 (Consultation Rule), and  
25 93 (Listing Rule).

26 \_\_\_\_\_  
27 <sup>25</sup> On July 16, 2020, the Council on Environmental Quality (“CEQ”) finalized an update to its  
28 1978 regulations implementing NEPA, which took effect on September 14, 2020. 85 Fed. Reg.  
43,304 (July 16, 2020). Since the Final Rules were finalized under the prior 1978 regulations,  
those regulations govern and are cited herein.

1           **A. The Final Rules Have a Significant Impact on the Environment and**  
2           **Therefore Required Preparation of an EIS.**

3           The Services' Final Rules are unquestionably "major federal action[s]" within the meaning  
4 of NEPA. *See* 40 C.F.R. § 1508.18(a) ("new or revised agency rules [and] regulations").  
5 Likewise, the Final Rules, which govern the implementation of one of our nation's bedrock  
6 environmental laws, "significantly affect the quality of the human environment." 42 U.S.C.  
7 § 4332(2)(C). The "low standard" of a significant effect, *League of Wilderness Defs. v.*  
8 *Connaughton*, 752 F.3d 755, 760 (9th Cir. 2014), is met if "substantial questions are raised as to  
9 whether a project ... may cause significant degradation of some human environmental factor,"  
10 *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998). Such "substantial  
11 questions" are raised when the action may adversely affect a listed species or designated critical  
12 habitat or may have highly controversial effects. 40 C.F.R. § 1508.27(b)(4), (9). The presence of  
13 any one of these factors may be sufficient to require preparation of an EIS. *Ocean Advocates v.*  
14 *U.S. Army Corps of Eng'rs*, 402 F.3d 846, 865 (9th Cir. 2004).

15           The Final Rules—which, as described above, fundamentally change the listing, delisting,  
16 critical habitat designation, and consultation processes and eliminate section 9 protections for  
17 newly-listed threatened species—indisputably meet NEPA's "low standard" for actions causing  
18 significant effects on the environment. *League of Wilderness Defs.*, 752 F.3d at 760. First, the  
19 Final Rules plainly "may adversely affect" listed species and critical habitat. 40 C.F.R.  
20 § 1508.27(b)(9). For example, the Listing Rule, as discussed *supra* Part I.A, limits the  
21 circumstances under which species can be listed as "threatened" in the future, and fundamentally  
22 alters the Services' approach to designating critical habitat such that less habitat will likely be  
23 designated for species recovery. The Consultation Rule, as discussed *supra* Part I.B, would  
24 upend the ESA's section 7 federal agency consultation process by, for example, significantly  
25 limiting the number, type, and scope of section 7 consultations and consequently limiting the  
26 situations in which alternatives and mitigation measures will be imposed to avoid or reduce the  
27 impacts of federal agency actions on listed species and critical habitat. And, as discussed *supra*  
28 Part I.C, the 4(d) Rule would strip fundamental protections from newly-listed threatened species,  
likely leaving them with fewer protections and with a greater likelihood of harm for extended

1 periods, if not indefinitely.

2 Second, there can be little doubt that impacts from the Final Rules “are likely to be highly  
3 controversial.” 40 C.F.R. § 1508.27(b)(4). The impact of an action is “highly controversial”  
4 when there is a substantial dispute “about [its] size, nature, or effect.” *Anderson v. Evans*, 371  
5 F.3d 475, 489 (9th Cir. 2004) (citations and quotations omitted). Here, the Services have  
6 admitted as much. *See* ESA2\_16876 (“We are going to state that these regulations will likely be  
7 controversial”); ESA\_ 25908 (“This proposed rule is expected to be controversial”); ESA2\_27076  
8 (same); ESA2\_29170 (same). And the Services predictably received over 200,000 public  
9 comments on the Proposed Rules (ESA 3356-394071), including thousands of individual  
10 concerned citizens, non-governmental organizations, municipal and regional agencies, industry  
11 groups, twenty states, and numerous members of Congress, including a wide range of  
12 stakeholders opposing the proposed rules and disputing the consideration of impacts.<sup>26</sup>

13 Finally, other factors triggering preparation of an EIS also apply to the Final Rules, such as  
14 their effects on “park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically  
15 critical areas,” cumulative effects, and that fact that the rules involve “highly uncertain” or  
16 “unique or unknown” risks. 40 C.F.R. § 1508.27(b)(3), (5), (7).

17 In sum, because the Final Rules will reduce protections for imperiled species and their  
18 habitats and are highly controversial, the Services were required to prepare an EIS before  
19 promulgating the Final Rules.

20 **B. The Final Rules Are Not Eligible for a Categorical Exclusion.**

21 The Services unlawfully concluded that the Final Rules were categorically excluded from  
22 NEPA review because they “are of a legal, technical, or procedural nature.” ESA 17, 58, 93. But  
23 this categorical exclusion only encompasses actions that are purely ministerial, non-substantive,  
24 or otherwise do not have the potential for any significant environmental effect—such as personnel  
25 actions, organizational changes, routine financial transactions, nondestructive data collection, and

26 \_\_\_\_\_  
27 <sup>26</sup> *See, e.g.*, ESA 545-53 (105 members of Congress), 706-07 (Ranking Members of the Senate  
28 Committee on Environment and Public Works and House Committee on Natural Resources);  
95767-96311 (thousands of scientists); 100639-100641 (East Bay Municipal Utility District);  
194384-194386 (Association of Zoos and Aquariums).

1 other routine government business. *See generally* 43 C.F.R. § 46.210. The exclusion plainly  
2 does not apply to the substantive, significant changes reflected in the Final Rules. *See Cal. ex rel.*  
3 *Lockyer v. USDA*, 575 F.3d 999, 1013-14, 1017 (9th Cir. 2009) (rejecting reliance on analogous  
4 categorical exclusion because replacing substantive environmental protections with less-  
5 protective regulatory regime qualified “as ‘substantive’ action and would meet the relatively low  
6 threshold to trigger some level of environmental analysis under [NEPA]”).

7 Moreover, even if the Final Rules otherwise qualified for coverage under the Services’ cited  
8 exclusions, they nonetheless present “extraordinary circumstances in which a normally excluded  
9 action may have a significant environmental effect,” and therefore still would require an EIS. 40  
10 C.F.R. § 1508.4. “Extraordinary circumstances” preclude application of categorical exclusions  
11 for actions that, among other things: have highly controversial, uncertain, or potentially  
12 significant environmental effects; unique or unknown environmental risks; significant impacts on  
13 ESA-listed species or critical habitat; or violate applicable environmental laws. *See* 43 C.F.R.  
14 § 46.215. While only one of these factors need apply to render a proposed agency action  
15 ineligible for exclusion, here, for the reasons explained above, every one of these factors applies.

16 In sum, in their zeal to effectuate the Trump Administration’s political, deregulatory  
17 agenda, the Services have blatantly violated NEPA.

### 18 CONCLUSION

19 Declaratory relief and vacatur are the proper remedies “when a court concludes that an  
20 agency’s conduct was illegal under the APA.” *California v. U.S. Dep’t of the Interior*, 381 F.  
21 Supp. 3d 1153, 1178 (N.D. Cal. 2019) (citing *Stewardship Council v. EPA*, 806 F.3d 520, 532  
22 (9th Cir. 2015)); *Lockyer*, 575 F.3d at 1020 (upholding vacatur of rule based on NEPA violation);  
23 *see* 5 U.S.C. § 706(2) (“reviewing court shall ... hold unlawful and set aside” agency action that  
24 violates the APA). Given the Services’ numerous violations of law in promulgating the Final  
25 Rules, State Plaintiffs respectfully request that this Court grant their motion for summary  
26 judgment, declare the Final Rules unlawful, and vacate the Final Rules.

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